Calendar No. 681

100TH CONGRESS
2d Session

SENATE

REPORT
100-352

THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988

MAY 20 (legislative day, MAY 18), 1988.—Ordered to be printed

Mr. BYRD (for Mr. BIDEN), from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1301]

The Committee on the Judiciary, to which was referred the bill (S. 1301), having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

CONTENTS

		Page
I.	Purpose	1
II.	Legislative History	2
III.	Discussion	8
IV.	Vote of Committee	30
V.	Text of S. 1301	30
VI.	Section-by-Section Analysis	38
VII.	Agency Views	49
VIII.	Cost Estimate	49
IX.	Regulatory Impact Statement	50
X.	Changes in Existing Law	51

I. PURPOSE

The Berne Convention Implementation Act of 1988 amends title 17, United States Code, to make the changes to the U.S. copyright law that are necessary for the United States to adhere to the Berne Convention for the Protection of Literary and Artistic Works signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

19-010

S523-10.

II. LEGISLATIVE HISTORY

A. Reasons for Joining the Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works, better known as the Berne Convention, is the highest internationally recognized standard for the protection of works of authorship of all kinds. U.S. membership in the Berne Convention will secure the highest available level of multilateral copyright protection for U.S. artists, authors and other creators. Adherence will also ensure effective U.S. participation in the formulation and management of international copyright policy.

Adherence to the Convention is in the national interest because it will ensure a strong, credible U.S. presence in the global marketplace. The United States is the world's largest exporter of copyright material. At a time when the United States is suffering a large overall trade deficit, works protected by copyright—such as books, sound recordings, motion pictures, and computer software—routinely generate a trade surplus. For 1987 alone, the surplus was greater than $1.5 billion. This performance is strong, but it is weakened by the existence of wide-spread piracy in many countries that are markets for U.S. copyrighted products. The U.S. International Trade Commission estimated recently that U.S. companies lost between $43 billion and $61 billion during 1986 because of inadequate legal protection for United States intellectual property, including copyrights. Adherence by the United States to the Berne Convention is a significant opportunity to reduce the impact of copyright piracy on our world trade position.

For more than 100 years, the Berne Convention has been the major multilateral agreement governing international copyright relations. The Berne Union has 77 members, including most of the free market countries, a number of developing nations, and several nations of the Eastern Bloc. The United States and the Soviet Union are conspicuously absent from this list. The United States and the Soviet Union, along with another 78 States, belong to the Universal Copyright Convention (UCC), which has lower standards of copyright protection. Both Berne and the UCC are administered by United Nations Agencies; Berne by the World Intellectual Property Organization (WIPO) and the UCC by the United Nations Educational Scientific and Cultural Organization (UNESCO). Fifty-three states adhere to both, and the United States has copyright relations, either through the UCC, certain other multilateral agreements, or bilaterally, with almost 100 countries.

The Berne Convention assures higher levels of protection than the UCC. Protection under both treaties is based on the general concept of "national treatment," which requires each member State to accord to nationals of other member States the same level of copyright protection provided to its own citizens. The national treatment obligation under the UCC is general, and its minimum levels of protection are not sufficient to deter piracy of U.S. works. While the Berne Convention is also grounded in the concept of national treatment, it is superior to the UCC because it also requires that generally well-specified minimum rights be guaranteed under the laws of member states for works originating in other member states. Among these are: duration of copyright for life of the author plus 50 years, and rights of translation, reproduction, public performance, broadcasting, adaptation and arrangement. Thus, Berne assures the highest level of protection in the countries that are the largest users of American copyrighted works.

While bilateral copyright agreements are important, there are clear advantages to a multilateral approach. First, adherence to Berne will immediately give the United States copyright relations with 24 countries with which no current relations exist. A twenty-fifth country, the Peoples Republic of China, with more than a billion potential users of American works, has given strong signals that it is considering adherence to Berne. Second, bilateral arrangements often suffer from lack of certainty or varying standards, and are more likely to be dishonored. Protection of U.S. works under bilateral agreements, moreover, is often problematic. The standards in these agreements vary widely, they lack the credibility and authority of an international convention like Berne, and sometimes they are simply ignored.

Berne adherence will also secure high-level protection for U.S. copyright holders by eliminating the need to rely on the so-called "back-door" to Berne protection. Article 3(1) of the Berne Convention extends protection to the works of authors of non-Berne countries, like the United States, if the works are published simultaneously in the country of origin and in a Berne country. Many U.S. copyright owners have attempted to obtain Berne protection through simultaneous publication of their works in the United States and in the nearest Berne country market, Canada.

In fact, simultaneous publication is expensive and uncertain. Only large U.S. companies can afford the substantial expense of attempting simultaneous publication in a Berne country. Article 3(3) of the Berne Convention defines publication as making a sufficient number of copies of the work available to the public in the Berne member country where it is published. This is difficult or impossible for many U.S. publishers and for most individual authors, artists and composers, for whom Berne protection through the "back door" is not economically feasible. Also, while the 1948 Brussels version of the Convention defined simultaneous publication as publication in two or more countries within 30 days, some Berne States, like Canada, have not adhered to the Brussels text and consequently may require publication within a shorter period of time. Proving simultaneous publication in a foreign court can be expensive, burdensome, and fraught with uncertainty. A recent example is the *Cineads* case, which arose in Thailand, a Berne member State. There, considerable expense was incurred by the American licensee in an ultimately unsuccessful attempt to prove simultaneous publication to the satisfaction of the Thai court.

Another reason that U.S. copyright owners may not safely rely on "back door" protection is that the Berne Convention allows its members to retaliate against the works of non-member States obtaining protection through this means. The capacity of Berne members to retaliate is not remote. Under the Canadian copyright law, for example, it is illegal to import books within 14 days of their first publication in another country. This provision, which is not generally enforced, was enacted to prohibit American publishers from using Canada as a source of "back door" Berne protection. The risk of such retaliation may increase if the United States remains outside the Berne Union while U.S. publishers seek to obtain "back door" protection.

Adherence to the Berne Convention is also necessary to ensure effective U.S. participation in the formulation and management of international copyright policy. New technologies like satellites, photocopiers, computers, and video and audio recorders have "internationalized" intellectual property to an unprecedented extent. When the United States withdrew from UNESCO in 1984, it gave up its vote in the UNESCO General Conference, the body that makes decisions on the programs of the UNESCO Copyright Division. Participation by the United States in an effective international copyright organization like the Berne Union is essential.

The U.S. Copyright Office, Administration representatives, and members of Congressional committees have recognized the importance to U.S. copyright holders of decisions taken under the auspices of the WIPO and, at the national level, states of the Berne Union. U.S. representatives have attended Berne revision and other Berne conferences, but as passive observers with no direct voice and only indirect influence on the deliberations. The limitations were described poignantly by Barbara Ringer, former Register of Copyrights, in her analysis of the 1967 Stockholm Conference to revise Berne:

> From the outset of the conference it was obvious that the developing countries were well organized and prepared to fight, and that the developed countries were in disarray. Such open negotiations as there were took place in a febrile atmosphere of crisis and bitter debate, but most of the real decisions were made *in camera*, between the principal negotiators from India and the United Kingdom. The large American observer delegation was generally aware of what was going on, and was concerned with both the form the Protocol was taking and the danger that the whole Conference might blow up. Although Abraham L. Kaminstein, the U.S. Register of Copyrights, made an "intervention" at the Conference, commenting on the course of events, the American delegates were Berne outsiders with no real influence upon the outcome.

Ringer, "The Role of the United States in International Copyright—Past, Present and Future," 56 *Geo. L. J.* 1050, 1070 (1968). U.S. adherence to Berne will give our officials the right to participate fully in the administration and management of the Convention. Since revision of the Convention requires a unanimous vote, the United States could, if it joins Berne, prevent any decision detrimental to U.S. interests.

Membership in Berne also will serve to strengthen the credibility of the U.S. position in trade negotiations with countries where piracy is not uncommon. Thailand, a Berne member, is a good example. Thai officials repeatedly highlight the inconsistency of U.S. efforts to persuade the Thai government to combat piracy of U.S. work when we do not belong to Berne. They add that while the United States has so far failed to join Berne, it nonetheless claims

Berne benefits through the "back door" and urges other nations to conform to Berne standards. Adherence can only heighten U.S. credibility and raise the likehood that other nations will enter the Convention or increase existing levels of copyright protection.

Berne adherence will also complement a major trade policy goal of the United States—to formulate an intellectual property code within the General Agreement on Tariffs and Trade (the GATT). An intellectual property code, including a section on copyrights, within the GATT must be drawn from the fundamental economic rights established in the Berne Convention and adequate and effective copyright laws.

The United States has an unparalleled stake in preseving Berne's high levels of copyright protection. The development of a GATT intellectual property code, while a commendable goal, is no substitute for U.S. adherence to the Berne Convention. The U.S. position for inclusion of Berne-level copyright standards within a GATT intellectual property code may be seriously undermined if the United States is advocating this position from outside the Berne Union.

B. ACTION PRECEDING COMMITTEE PASSAGE OF S. 1301

For almost one hundred years, differences between U.S. law and Berne Convention standards kept our nation from joining the Convention. However, in the last two decades, changes in American law and in the Berne standards have narrowed that gap. S. 1301 makes the last remaining changes to the copyright law to reconcile the difference between Berne standards and U.S. law so that the United States can join Berne.

During the 99th Congress, Senator Charles McC. Mathas, Jr., Chairman of the Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks, compiled an extensive record on the Berne Convention. Senator Mathias convened a hearing on May 16, 1985 to examine the implications, both domestic and international, of U.S. adherence to Berne. On April 15, 1986, the Subcommittee held a second hearing on Berne. See S. Hrg. 99-982. On October 1, 1986, Senator Mathias introduced S. 2904, the Berne Convention Implementation Act of 1986, in order to focus debate on the practical questions presented by U.S. adherence to Berne.

In the 100th Congress, Senator Leahy introduced S. 1301, his bill to implement the Berne Convention, on May 29, 1987. On December 18, 1987, at the Administration's request, Senator Hatch introduced S. 1971, a bill that took a slightly different approach toward implementing the Berne Convention. Senator Thurmond cosponsored that initiative.

On February 18, 1988, Representative Robert Kastenmeier, the principal House sponsor of Berne implementing legislation, and high ranking Administration officials testified before the Patents, Copyrights and Trademarks Subcommittee that U.S. membership in the Berne Convention would benefit the U.S. copyright community and enhance U.S. trade policy. C. William Verity, the Secretary of Commerce, Clayton Yeutter, the U.S. Trade Representative, and Allan Wallis, Under Secretary of State for Economic Affairs, expressed the Administration's strong support for Berne. Ralph

Oman, the Register of Copyrights, and Irwin Karp, who served as Chairman of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention that was formed in 1985 at the suggestion of the State Department, also testified in support of U.S. adherence.

On March 3, 1988, Chairman DeConcini convened a second hearing on Berne. Top officials from the pharmaceutical, publishing, motion picture and information industries testified in support of Berne. The first panel consisted of Mr. Kenneth Dam, Vice President of IBM, Mr. C.L. Clemente, General Counsel of Pfizer, Inc., Mr. David Brown, representing the Motion Picture Association of America and the Alliance of Motion Picture and Television Producers, and Mr. Andrew Neilly, of John Wiley and Sons, Inc. Mr. Dam also submitted statements in support of Berne adherence from two large private sector coalitions, the National Committee for Berne Convention (NCBC) and the Committee for Adherence to Berne (CAB). Mr. Clemente also advised the subcommitee of the support for Berne from several major corporations participating in the Intellectual Property Committee (IPC). A list of members of the NCBC, CAB and IPC is included as an appendix to this section.

The second and third panels primarily addressed the question of moral rights. The second set of panelists were Mr. David Ladd, representing the Coalition to Preserve the American Copyright Tradition, Mr. Donald Kummerfeld, representing the Magazine Publishers of America, and Mr. John Mack Carter, representing the American Society of Magazine Editors. They argued against any change to the U.S. laws concerning an artist's right to control attribution of or any alteration to his creation.

The third panel included Mr. Steven Spielberg, representing the Director's Guild of America, Mr. George Lucas, Chairman of the Board of Lucasfilm, Inc., and Mr. Bo Goldman, representing the Writer's Guild of America, West. While supporting adherence to Berne, they encouraged the Committee to enact legislation to enhance an artist's right to control any alteration to his creation.

The committee notes that the Subcommittee on Technology and the Law also examined the right of an artist to control any alteration to his creation. On May 12, 1987, the subcommittee conducted a hearing on the legal issues that arise when color is added to films originally produced, sold and distributed in black and white. See S. Hrg. 100-391.

Finally, the committee would like to acknowledge the fine work of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice under the leadership of Chairman Robert E. Kastenmeier. Chairman Kastenmeier compiled a valuable hearing record from six days of hearings and from a consultation in Paris and Geneva with copyright experts from Berne member countries. The committee's deliberations benefitted from the House record.

NATIONS THAT ARE MEMBERS OF THE BERNE CONVENTION

(COPYRIGHT—JANUARY 1987)

Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cyprus, Czechoslovakia, Denmark, Egypt, Fiji, Finland, France, Gabon, German Democratic Republic, Germany, Federal Republic of, Greece, Guinea, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Lebanon, Libya, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Mauritania, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Rwanda, Senegal, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, United Kingdom, Uruguay, Venezuela, Yugoslavia, Zaire, Zimbabwe.

Appendix

National Committee for the Berne Convention (NCBC)

ADAPSO (The Computer Software and Services Industry Association), American Association of School Administrators, American Association of University Professors, American Council on Education, American Library Association, ASCAP (American Society of Composers, Authors & Publishers), Applied Data Research, Inc., AAUP (Association of American University Presses), Association of Research Libraries, Autodesk, Inc., Baltimore County Schools, BMI (Broadcast Music Inc.), CBEMA (Computer and Business Equipment Manufacturers Association), Comshare, Incorporated, Council for American Private Education, The Data Group Corporation, Deneb Systems, Inc., The Walt Disney Company, Distribution Management Systems Corp., Elsevier Science Publishing Company, Inc., Gancom, Inc., Harcourt Brace Jovanovich, Inc., I.M.R.S., Inc., Integral Business Systems, IBM (International Business Machines Corporation), IIA (Information Industry Association), International Reading Association, Johns Hopkins University, Management Science America, Inc., (MSA), Music Educations National Conference, National Clearinghouse for Bilingual Education, National Commission on Libraries and Information Science, NMPA (National Music Publishers Association), NSBA (National School Boards Association), SESAC Inc., Supply Tech, Inc., TLB, Inc., Unitech Software, Inc., U.S. Catholic Conference, United States Council for International Business, Vanguard Atlantic Ltd., Viewplan, Inc., VM Personal Computing, Inc., WOS Data Systems, Inc., John Wiley & Sons, Inc. Publishers.

Ashton-Tate Corporation, Harris Publishing Company, Hudson Hills Press, Inc., IPL (Intellectual Property Owners, Inc.), Lotus Development Corporation, MPAA (Motion Picture Association of America), Music Publishers Association of the United States, Peter Norton Computing Members. Intellectual Property Committee.

Committee for Adherence to Berne (CAB)

ADAPSO, American Electronics Association, American Film Marketing Association, Association of American Exporters and Importers, AT&T, BMG Music (Formerly RCA-Ariola, Intl.), California Council for International Trade, Computer and Business Equipment Manufacturers Association, Consumers for a Sound Economy, Digital Equipment Corporation, Elsevier, Science Publishing Co., Inc., Gulf & Western (Simon & Schuster Paramount Pictures), Hewlett-Packard Company, Hasbro Toy Company, Hudson Hill

Press, IBM Corporation, Information Industries Association, Intellectual Property Committee, Intellectual Property Owners, John Wiley & Sons, Inc., Lotus Software, Motion Picture Association of America, National Association of Manufcturers, Training Media Distributor Association, Texas Instruments Incorporated, Walt Disney Studios.

Intellectual Property Committee (IPC)

Bristol-Myers Company, E.I. du Pont de Nemours and Company, FMC Corporation, General Electric Company, General Motors Corporation, Hewlett-Packard Company, IBM Corporation, Johnson & Johnson, Merck & Co., Inc., Monsanto Company, Pfizer Inc., and Rockwell International.

III. DISCUSSION

The section-by-section analysis contained in Part VI. of this report addresses each provision of S. 1301. Several provisions of the bill are discussed in greater detail below.

ARCHITECTUAL WORKS

In order to be compatible with the Berne Convention, U.S. copyright law must protect the subject matter that is entitled to protection under Berne. To ensure that U.S. law protects architectural works to the extent required by Berne, Section 4(l) amends the definition of "Pictorial, graphic, and sculptural works" contained in section 101 of Title 17, United States Code. The Act strikes from the definition the phrase, "technical drawings, diagrams, and models," and inserts in lieu thereof, "diagrams, models, and technical drawings, *including architectural plans* (emphasis added)."

The U.S. copyright law, as explained by legislative reports and as applied by the courts, protects architectural plans and drawings. The 1976 Copyright Act did not expressly mention them in the definition of "Pictorial, graphic, and sculptural works" contained in section 101. See Copyright Law Revision, House Report No. 94-1476, 94th Congress, 2d Session (1976), p. 55 ("[a]n architect's *plans and drawings* would, of course, be protected by copyright. . ."). See also testimony of David E. Lawson, FAIA, before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, February 9, 1988, p. 4.

The amendment made by this Act makes clear that, "pictorial, graphic, and sculptural works," include architectural plans and drawings and merely codifies the current law governing architectural plans and drawings. Thus, it will continue to be an infringement to reproduce the architectural plans themselves without permission of the copyright holder. Simply to construct any architectural work that is represented in copyrighted architectural plans remains subject, however, to 17 USC 113, which is not changed by S. 1301.

This bill does not amend any other provision of the definition of "pictorial, graphic, and sculptural works," and deliberately leaves in place the final sentence of the definition, which states that the design of a useful article (also defined in section 101) shall be considered a pictorial, graphic, and sculptural work:

> only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article.

This same standard of physical or conceptual separability applied by the courts to other pictorial, graphic, and sculptural works applies to architectural works. Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. Only those elements, if any, that can be identified separately from the shape of the useful article (as a simple example, a gargoyle on a building) are copyrightable.

In the case of architectural works, in addition to protection for separable artistic sculpture or decorative ornamentation, purely nonfunctional or monumental structures, as well as models, may be subject to copyright.

It is the committee's conclusion that U.S. Copyright law as modified by this Act, and other state and federal remedies, protect architectural works to the extent required by the Berne Convention. However, the committee will ask the Copyright Office to work with architects, builders, and contractors on an in-depth study of United States laws governing architectural works. That study, which will be completed by January 2, 1989, will also review the level of protection provided to architectural works by other Berne members. The committee looks forward to the Copyright Office's recommendation on whether it is desirable to increase the level of protection that architectural works enjoy under the U.S. copyright law.

MORAL RIGHTS

A. SECTION 2—DECLARATIONS

Article 6bis of the Berne Convention requires that member States recognize, independently of the author's economic rights, that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

The statutes and decisions under which these rights are protected in Berne States are commonly referred to as comprising the "moral rights" in that sense are not provided in U.S. statutes, and various decisions of state and federal courts have rejected claims that were denominated specifically as "moral rights" or that sought relief under the "moral rights" doctrine.

However, protection is provided under existing U.S. law for the rights of authors listed in Article 6bis: (1) to claim authorship of their works ("the right of paternity"); and (2) to object to distortion, mutilation or other modification of their works, or other derogatory action with respect thereto, that would prejudice their honor or reputation (the "right of integrity"). This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.

Section 2(3) of the Act clarifies that the amendments made by this Act, together with the law as it exists on the date of enactment of the Act, satisfy U.S. obligations under Article 6bis and that no further rights or interests shall be recognized or created for that purpose. The committee notes that Dr. Arpad Bogsch, Director General of WIPO, has given his opinion that the United States may become a member of the Berne Convention without making any changes to U.S. law for the purposes of Article 6bis. See letter of Dr. Arpad Bogsch to Irwin Karp, Esq., June 16, 1987, attached to Mr. Karp's prepared testimony of February 18, 1988. Consequently, the "moral rights" doctrine is not incorporated into the U.S. law by this statute.

B. SECTION 3—CONSTRUCTION OF THE BERNE CONVENTION

Because existing U.S. law satisfies the requirements of Article 6bis of Berne, the committee has decided not to address the question of whether new provisions should be added to the Copyright Act or other statutes with respect to the author's right of paternity or right of integrity.

The committee believes that U.S. adherence to the Berne Convention, and satisfaction of U.S. obligations under that Convention, should not change current law on this subject. Therefore, S. 1301 will not, and should not, change the current balance of rights between American authors and proprietors, modify current copyright rules and relationships, or alter the precedential effect of prior decisions.

The committee also does not intend to change, reduce, or expand existing U.S. law with respect to the author's right to claim authorship or his or her right to object to distortion.

Accordingly, Section 3 of this Act, in conjunction with other provisions of this Act, is intended to preserve the status quo with respect to those rights. The provisions are intended neither to reduce nor expand any rights that may now exist, nor to create any new rights under federal or state statutes or the common law. Consequently, neither the interpretation of, nor the decisions in, prior cases should be changed or affected in any way because of the provisions of this Act, the action of our adherence to the Berne convention, or our obligations under Berne. Courts should be as free to apply common law principles and to interpret statutory provisions, with respect to claims of the right of paternity and the right of integrity as they would be in the absence of U.S. adherence to Berne.

C. SECTION 4(3)—EFFECT OF BERNE CONVENTION

The committee has sought to assure that the existing balance of rights between authors and proprietors is unaffected by U.S. membership in the Berne Convention, and that future expansion or reduction of the right to paternity and the right to integrity in U.S. law is based solely upon the development of the common law, court decisions based on existing statutes, or actions of the state or federal government. Section 4, as it applies to those rights, mandates that courts in the U.S. faced with claims to those rights should look for guidance neither to Berne nor to the laws of other signatories to Berne, except where U.S. conflict of law rules or a specific contract require the application of foreign law.

D. SECTION 6—PREEMPTION

As stated above, the committee has concluded that the "moral rights" obligations of the United States under the Berne Convention are satisfied by certain rights provided for in a variety of federal and state laws. The purpose of Section 6 is to make clear that the scope of federal preemption under Title 17, United States Code, remains unaffected by this Act, and will be neither expanded nor reduced by U.S. adherence to Berne or the satisfaction of U.S obligations thereunder.

COPYRIGHT FORMALITIES

Article 5(2) of the Berne Convention states that "the enjoyment and the exercise of [copyright] shall not be subject to any formality." As Donald C. Curran, the Acting Register of Copyrights, pointed out to the Subcommittee on Patents, Copyrights and Trademarks in its first hearing on the subject of joining the Berne Convention, "at least since 1908, the absence of 'formalities' has been generally understood as one of the salient characteristics of the Berne Union." *U.S. Adherence to the Berne Convention,* Hearings before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary, 99th Cong. (hereafter cited as 99th Congress Hearings), Statement of Acting Register of Copyrights Donald C. Curran, at 71 (May 16, 1985). It has also long been recognized that, after the 1976 copyright law revision, the principal remaining area of incompatibility between current U.S. copyright law and the standards of the Berne Convention is in the field of formalities. The issue was succinctly framed by Dr. Arpad Bogsch, the Director-General of the World Intellectual Property Organization, which adminsters the Berne Convention, in his 1985 testimony before the subcommittee:

> The only real difference . . . that makes the U.S. law incompatible with the Berne Convention consists in the notice and registration requirements. 99th Congress Hearings, at 10 (May 16, 1985.)

With respect to formalities, S. 1301, as amended, charges the Copyright Act to eliminate those provisions, and only those provisions, that the committee believes to be incompatible with the directive of Article 5(2) of the Berne Convention. It thus brings U.S. law into conformity with a central principle that has characterized Berne almost since its inception, and most clearly since the 1908 Berlin revision of the Convention. This is the concept of automatic protection of works of authorship, and the rejection of the idea that the government of a State adhering to the Berne Convention may condition effective protection for a work originating in another Berne member State on the satisfaction of government-imposed formal requirements.

A. HISTORICAL BACKGROUND

The idea of protection without formalities was a central concern of the European authors, whose efforts culminated in the adoption of the original Berne Convention in 1886. The 1858 Congress of Authors and Artists in Brussels, widely regarded as the first step in the process leading up to the adoption of Berne, adopted a resolution stating that "foreign authors should not be compelled to fulfill particular formalities in order to be able to invoke and bring suit on their property right." *See* 99th Congress Hearings, at 62 (statement of Acting Register Donald C. Curran).

The original text of the Berne Convention permitted member States to condition their protection of works on the satisfaction of any formalities imposed by the domestic law of the country of the works' origin. However, the courts in some countries interpreted this provision to allow the forum country to impose formalities parallel to those existing in the country of origin. This frustrated the original goal of eliminating formalities for protection of foreign works, a situation which led to the adoption, at several authors' Congresses in the first decade of this century, of resolutions calling for the elimination of all formalities for protection of foreign works originating in Berne member States. Ultimately, the 1908 Berlin revision of the Berne Convention adopted the language now found in Article 5(2) of the Convention's text: a flat prohibition on the imposition of any governmental formalities as a precondition for "the enjoyment and the exercise" of copyright in foreign works from other members of the Berne Union.

B. FORMALITIES UNDER CURRENT U.S. COPYRIGHT LAW

The U.S. Copyright Act has always contained some formalities which, if applied to works originating in Berne member States, would render our law incompatible with the standard enunciated in Article 5(2). While the precise definition of the term "formalities," as used in Berne Convention parlance, has been subject to dispute, there is general agreement that the suspect provisions of U.S. law fall into three major categories: notice, registration, and recordation.[1]

1. Notice

The requirement that a work bear some sort of a notice of copyright in order to obtain or maintain copyright protection has been a feature of every U.S. copyright law since the original Copyright Act of 1790. The current provisions, found in sections 401 et seq. of

---

[1] A fourth type of formality in U.S. law was the manufacturing clause, which conditioned copyright protection for certain works on their manufacture in the United States or Canada. See 17 U.S.C. 601 et seq. The most recent incarnation of the manufacturing clause expired on July 1, 1986, and has not been re-enacted.

A fifth provision of current U.S. law which is sometimes discussed as a formality is the requirement that copies of all works published with notice of copyright in the United States be deposited with the Library of Congress. *See* 17 U.S.C. 407. However, the statute explicitly states that the deposit requirements are not "conditions of copyright protection," and the failure to comply with this requirement, even though it arises from a provision of the Copyright Act, has no consequences whatever for either the "enjoyment" or the "exercise" of copyright protection. Accordingly, it is undisputed that the deposit requirement, even as applied to foreign works from Berne countries, is not a formality inconsistent with Berne standards.

Title 17, have been summarized by the Register of Copyrights as follows:

> Under the present law, omission or mistakes amounting to an omission of the notice can result in the work being placed in the public domain in this country if prescribed corrective measures are not taken within the statutorily specified timeframe. This constitutes a prohibited formality under Berne, at least as applied to works whose country of origin is another Berne state.

Testimony of Ralph Oman before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, September 17, 1987, at 23.

In his tesimony before the Subcommittee on Patents, Copyrights, and Trademarks, the Register of Copyrights asserted that the "eliminat[ion of] copyright notice as a condition of copyright protection [is] required by the Berne Convention." Statement of Ralph Oman, February 18, 1988, at 15. The committee agrees with this conclusion, and notes that the same conclusion has been reached by virtually every witness and commentator who has addressed the notice provisions of current U.S. copyright law.

2. *Registration*

a. Summary of current law

Section 408(a) of the Copyright Act provides that a claim of copyright in a work may be registered with the Copyright Office "at any time during the subsistence of copyright in any published or unpublished work." The same provision states that "such registration is not a condition of copyright protection," except when registration is made as part of the process of curing the omission of copyright notice. 17 U.S.C. 408(a), 405. With this exception, registration is thus not a prerequisite to the existence of copyright protection. However, the question of whether the registration provisions of existing U.S. copyright law, as applied to foreign works originating in States adhering to Berne, constitute a prohibited formality with respect to the "enjoyment and exercise" of copyright, to employ the parlance of Article 5(2) of the Berne Convention, is a much more difficult question.

The failure to register a claim of copyright in a work has profound consequences for the ability of an author or other copyright claimant to enforce his or her claim to copyright. A central consequence is spelled out in section 411(a) of Title 17. The general rule is that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." 17 U.S.C. 411(a); *see also* 17 U.S.C. 501(b).

As a result of Section 411(a), compliance with copyright registration procedures is a statutory prerequisite to the right of an author or other copyright proprietor to seek any redress, whether by injunction, damages or both, for infringement of the work. Thus, until the Register of Copyrights has determined that the work in question "constitutes copyrightable subject matter and [meets] the other legal and formal requirements" of the Copyright Act, 17

U.S.C. 410(a), and that "the claim is [not] invalid for any other reason," 17 U.S.C. 410(b), judicial enforcement of the claim to copyright cannot be obtained.[2]

Registration is significant for enforcement of copyright under current law in other ways as well. If registration is made within five years after first publication of the work, the certificate of registration issued by the Register of Copyrights "shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. 410(c). Timely registration is also a prerequisite to an award of statutory damages and attorneys' fees under sections 504 and 505 of the Act. 17 USC 412. Finally, if a claim in a work has been registered, the recordation with the Copyright Office of a transfer of copyright ownership serves as constructive notice to all persons of the fact of the transfer, and, with certain limitations, gives the recorded transfer priority over subsequent purported transfers. 17 U.S.C. 205 (c) and (e).

b. Compatibility with Berne

The issue that the committee has had to confront is whether these registration provisions of current law are compatible with the standard set forth in Article 5(2) of Berne. The question is whether they, either *en masse* or singly, make the "exercise" or the "enjoyment" of copyright "subject to [a] formality". If so, they are inconsistent with Berne, and must be changed in order for the United States to join the Convention.

After considering extensive testimony and submissions on this topic, the committee has concluded that section 411(a) in its current form is incompatible with Article 5(2) of Berne. The committee recognizes that this conclusion is not free from doubt, but on the record before it, the committee is persuaded that the requirement of registration as a prerequisite to an infringement lawsuit is a prohibited formality. On the other hand, it has concluded that the statutory incentives for registration contained in the provisions of sections 410(c), 412, and 205 of the Copyright Act are not preconditions for the "enjoyment and exercise" of copyright. While those provisions substantially enhance the relief available to the proprietor of a registered work, they do not condition the availability of all meaningful relief on registration, and therefore are not inconsistent with Berne.

---

[2] Section 411(a) contains an exception in the case of a work as to which the copyright proprietor has sought to register a claim, but the Copyright Office has refused to issue a certificate of registration. In this case, the author or other claimant "is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights." The exception in section 411(a) for claims which the Copyright Office has refused to register ameliorates the situation somewhat in a handful of cases. (The Copyright Office reported to the Subcommitte that, "over the past five years, [it] has been served with a copy of a complaint under section 411(a) in thirteen cases," in eleven of which it entered an appearance on the issue of registrability. Responses of Register Oman to questions of Senator Leahy, March 31, 1988, at 18.) But the existence of this exception does not alter the fact that current U.S. law imposes the formality that a plaintiff must first seek to register his copyright claim, and thereby request the Copyright Office to make a determination of the validity of the claim, before the claim may be judicially enforced. The exception to section 411(a) merely provides that the Office must be accorded a second opportunity to express its views on the claim's validity after suit is filed if it has refused to recognize the claim before the suit is filed. Of course, the court is not bound by the views expressed by the Register in a case in which suit is filed despite his refusal to register the claim. But the same is true in any infringement lawsuit, in which the court may find that the claim is not valid despite the fact that the Register has recognized it by issuing a certificate of registration.

The fact remains that, in each of the thousands of copyright infringement lawsuits filed in federal courts throughout the United States since present section 411(a) was enacted, a review by the Register of Copyrights of the validity of a claim has been a necessary precondition for enforcement of copyright protection, even though such review is never sufficient by itself to enforce such protection; under U.S. law, copyright may be enforced only judicially, not administratively.

The committee's conclusion on this issue is consistant with the preponderance of the testimony before it. The statement of the Director General of WIPO before the subcommittee in 1985 has already been quoted. While Dr. Bogsch did not specify the particulars of the statutory "registration requirements" in U.S. law that he viewed as incompatible with Berne, the committee believes that the most reasonable interpretation of his testimony is that section 411(a), which makes registration a prerequisite for judicial enforcement of copyright, is among those provisions of U.S. law which do not comport with the Berne standard of protection without formalities. More importantly, the committee of U.S. copyright experts which studied the issue of Berne compatibility at the request of the State Department reached the same conclusion with respect to section 411(a). This Ad Hoc Committee's final report concluded that "section 411 is . . . not compatible with Berne to the extent that it requires registration of a work of which the U.S. is not the country of origin as a prerequisite to instituting an infringement action." 99th Congress Hearings, at 473. Other experts in U.S. copyright law, and on the requirements of the Berne Convention, have reached the same conclusion. See, e.g. Statement of Irwin Karp, February 18, 1988, at 15–18; Statement of Association of American Publishers to House Subcommittee on Courts, Civil Liberties and the Administration of Justice, November 6, 1987, at 2–3; Statement of Morton David Goldberg for the Information Industry Association before the House Subcommittee, February 10, 1988 at 30–39; *see also* Gabay, "The United States Copyright System and the Berne Convention," 26 *Bull. Copyright Society* 202, 208 (1978–1979); Stewart, *International Copyright and Neighbouring Rights* 106 (1983), Ginsburg, "L'evolution recente du droit d'auteur aux Etats-Unis," *Revue Internationale du Droit D'Autur* 110 (1987).

The principal dissenter from this consensus—that section 411(a) establishes a formality prohibited by the Berne Convention—is the Copyright Office.[3] As the agency charged with the administration of the copyright laws, and with the representation of U.S. government interests in the field of copyright in international fora, the Copyright Office possesses considerable expertise on this question. The committee has carefully considered its arguments in support of the proposition that section 411(a) in its current form is compatible with Berne standards. A number of those arguments merit discussion in this report.

The Copyright Office's position rests upon two assertions. First, it argues that the requirement of registration as a prerequisite to an infringement suit is compatible with Berne standards. Second, it argues that the elimination of section 411(a) will undermine the existing system of registration, and that it therefore is undesirable on policy grounds. These arguments will be addressed in turn.

---

[3] In testimony before the Subcommittee on Patents, Copyrights and Trademarks, representatives of the Administration generally supported the view presented by the Copyright Office. However, as the Commissioner of Patents and Trademarks testified, the Administration would "consider supporting" elimination of section 411(a) on the basis of a proposal "acceptable to the Copyright Office." Statement of Donald J. Quigg, at 13. Administration witnesses presented no independent arguments in support of the proposition that section 411(a) is compatible with Berne.

c. The arguments for compatibility

Although the Copyright Office has consistently testified that there is "ample legal justification" for the conclusion that the current law on registration is compatible with Berne, see Senate Hearings, 99th Congress, at 52, the specific basis for its conclusion with respect to section 411(a) is far from clear. In his testimony before the House Subcommittee on June 17, 1987, the Register noted:

> The laws and practices of Berne countries that impose restrictions on the enforcement of rights and the WIPO's *Guide to the Berne Convention* support the view that the Berne Convention permits a distinction between those formalities whose observance constitutes a "condition . . . for the right to exist" and procedural or judicial formalities. Formalities that constitute a condition of copyright protection are forbidden; those of a procedural or judicial nature are not.

House testimony, at 18.

Applying this distinction to all the registration provisions except the use of registration in the process of curing a failure to provide notice of copyright, the Register testified that:

> in all other cases, registration . . . is procedural and relates to judicial formalities. Even as a prerequisite to litigation, registration [is] not [a] condition for the right to exist. When one examines the laws of Berne members, especially in South and Central America, one finds public registration requirements that are closer to proscribed formalities than those present in the United States system.

Id., at 25–26.

The Register is correct that, with the exception of the provisions on registration as an element of curing notice defects, registration is "not a condition for [copyright] to exist" under current U.S. law. But Article 5(2) of Berne does not address the existence of copyright. It prohibits formalities as preconditions for "the enjoyment and the exercise" of copyright. The author of an unregistered work does have a copyright on his work, under U.S. law. But his "enjoyment and exercise" of that copyright is severely limited, or perhaps non-existent, if he is barred access to the only forum in which he may seek to prevent, or to be compensated for, unauthorized reproductions or other infringements of the work. Under current law, the author of an unregistered work has, if anything, a right without a remedy, a right that "exists" but that he is unable to fully "enjoy or exercise."

Senator Leahy pinpointed this distinction in his statement on the Senate floor when he introduced S. 1301:

> Registration of a copyrighted work with the Copyright Office is not, technically speaking, a condition for the existence of copyright under current U.S. law. It is, however, a precondition for the exercise of any of the bundle of

> rights conferred by copyright, since, under section 411 of the Copyright Act, no court action for infringement of the copyright may be maintained until registration has been accomplished. This metaphysical distinction between the existence of a right to prevent unauthorized use of a copyrighted work, and the exericse of that right, may be maintainable under other legal systems. But in our legal tradition, which disfavors the creation of rights without remedies, it is more difficult to argue that a hurdle such as registration, wich bars the courthouse door to any enforcement of an author's rights, is not a formality inconsistent with Berne standards.

133 Cong. Rec. S. 7370 (daily ed., May 29, 1987) (statement of Senator Leahy).

After nearly a year of consideration of this question and extensive testimony on the topic, the committee concludes that the distinction proffered by the Copyright Office—between formalities that are "a condition of copyright protection" and those that are merely procedural—remains, in the context of the existing law on registration as a prerequisite to suit, more "metaphysical" than real.[4]

Furthermore, the committee observes that the Copyright Office's argument on this score may set a dangerous precedent. If the United States enters Berne with section 411(a) intact, on the theory that "procedural" formalities are permissible prerequisites to any enforcement of copyright, we might soon come to regret our decision.

The Copyright Office's process for reviewing applications for registration is fair and principled, and there is no suggestion in the record before the committee that registration is ever delayed or denied for improper reasons. But in today's world trading environment, it would be unrealistic to assume that this would always be the case in other countries that now are, or may soon become, Berne members. If the world's largest exporter of copyrighted goods takes the position that a government agency may, without violating Berne standards, be entrusted with the keys to the courthouse door in infringement actions, other countries may seize upon this precedent to impose truly onerous and unjustified prerequisites to copyright enforcement in their legal systems. At that point, the problem of a right without a remedy would become a very practical concern to American authors, publishers, and other copyright interests, rather than merely a matter of jurisprudential theory.

Some foreign countries may, and no doubt will, adopt a variety of strategems in the future to frustrate copyright protection for works created by American authors. Were the U.S. to join Berne and retain section 411(a) in its current form, we would send the undesirable signal to current and future Berne members that registration procedures provide a legally unobjectionable method for achieving this goal. These countries could condition enforcement of copyright on the satisfaction of registration requirements tailored to minimize impact on domestic creators, while erecting obstacles to the protection of copyright in foreign works, a market category in which U.S. works are dominant in many foreign countries. Such strategems could be legitimized by the example of U.S. adherence to Berne, with provisions that are legally similar (even if practically quite different) and are left intact in our law.

---

[4] In response to Senator Leahy's question about what rights the author or other copyright owner of an unregistered work may be said to "enjoy and exercise" under current law, the Register responded by referring to the exception contained in section 411(a) which allows lawsuits by claimants who have been denied registration: "registration must be attempted before filing an infringement action, but it does not bar the courthouse door." Responses, March 31, 1988, at 7. The committee has previously explained why, in its view, the existence of this exception does not save section 411(a) from incompatibility with Berne standards (see note 2, *supra*).

This scenario, which is far from speculative, would undermine the advantages for enhanced trade in copyrighted works that would otherwise flow from adherence to Berne. The burden lifted from the shoulders of our trade negotiators by U.S. adherence to Berne would be replaced by another difficult addition to the agenda of our bilateral discussions on copyright policy. Our power to veto changes in the text of Berne that would be harmful to the interests of creators and copyright owners would be undercut by the plausible interpretation of existing Berne standards that could be derived from our failure to eliminate registration as a prerequisite to enforcement of copyright. Even subsequent legislation to modify section 411(a) would not fully undo the damage created by this precedent. Surely the United States should hesitate to establish such a precedent.

The second basis on which the Copyright Office asserts the compatibility of section 411(a) with Berne relates to the Practices of other Berne countries, which it asserts already include more onerous formalities. The record on this point is far from clear. Certainly no major player in the Berne system, such as the European nations or Japan, requires registration as a condition of judicial enforcement of copyright. Nor is such a requirement found in the copyright systems of those Berne members, such as the United Kingdom and other Commonwealth countries, whose legal systems, like ours, derive from the common law. The Register, in his responses to Senator Leahy's written questions, notes that "all Berne countries maintain some procedural requirements to enforce copyright," and summarizes the available data on registration systems as follows:

> At least nine Berne countries have registration systems that are mandatory in certain respects—that is, failure to comply results in loss of protection, or completely bars maintenance of the right. Some of these countries exempt foreign works. Some may apply the Convention directly and the court would exempt foreign works. At least two (Argentina and Uruguay) appear not to exempt foreign works.

Responses of March 31, 1988, at 17. The Report of the Ad Hoc Committee provides further information on the practices of Argentina and Uruguay, stating that these countries "exempt foreigners from their registration requirements if they have complied with the requirements of protection in their countries of origin." 99th Congress Hearings at 481, n. 22; see also id. at 483, 487–88.

Berne does not forbid its members to impose formalities on works first published on its own territory. The United States would be as free to impose on its own authors a requirement of registration as a prerequisite to suit as the existing Berne members are free, apparently, to exempt foreign works from their registration requirements. As a practical matter, it may be that Argentina and Uruguay, as their laws have been explained by the Ad Hoc Committee, take this approach, since so few Berne members seem to impose such a requirement on their own nationals. In any event, the committee is not prepared to conclude that the practices of at most two of the 78 Berne member nations, to the extent those practices can be discerned, prvide more than minimal support for the argument that section 411(a) in its current form is compatible with Berne.

Accordingly, the committee remains unpersuaded by the arguments that existing section 411(a) may be retained unchanged as the U.S. prepares to join the Berne Convention.

d. Policy arguments for retaining section 411(a)

The Copyright Office has been even more vocal in its argument that any change in the registration requirements of current law, apart from the role of registration in curing defective notice of copyright, should be resisted on policy grounds. Two principal policy arguments have been advanced: first, that any change in current law would harm the existing registration system; and second, that the elimination of section 411(a) would clog the courts by reducing the efficiency of copyright litigation.

i. Impact on registration system.—The committee concurs with the Copyright Office's assertion that the present system of copyright registration benefits all participants in the copyright system, as well as the general public. Registration provides a useful public record, and provides the Library of Congress with an efficient means of obtaining copies of copyrighted works without resorting to enforcement of the statutory deposit procedure. The registration system is voluntary, in the sense that an author is not legally required to register a work, although, as noted above, he may not seek to enforce his rights with respect to that work without having attempted to register it. But even though voluntary, compliance with the registration procedures is nearly universal. About 600,000 works are registered each year, including virtually all of those for which the public benefits of registration are substantial.

Nearly every significant work is registered because the incentives for registration are considerable. Some of those incentives have little to do with the enforcement procedures of the statute. There are sound business reasons for registration wholly apart from the prospect of infringement litigation. Section 411(a) is, of course, an incentive, since copyright claims in an unregistered work cannot be judicially enforced. While section 411(a) gives the Copyright Office access to the court for copyright litigants, two even more powerful incentives included in the 1976 revision of the Copyright Act govern what the copyright proprietor may seek once the courthouse door is opened: section 410(c) gives a timely registration prima facie effect in infringement litigation, and section 412 conditions the availability of the powerful remedies of statutory damages and attorneys' fees upon timely registration. Section 205 (c) and (e) also provide an incentive for transferees of copyright ownership to ensure that registration is made. Finally, of course, there are the intangible factors that may lead authors to register their works with the Copyright Office in the belief that a registration certificate constitutes a government agency's stamp of approval on the fruit of the author's creative efforts.

Thus, while the Register of Copyrights has frequently referred to the statutory incentives for registration as a "three-legged stool," in fact the registration system is underpinned by a number of incentives—legal, business, and personal—all of which point an author or other copyright proprietor toward the option of registration.

The issue presented by this legislation is whether the elimination or modification of one of these underpinnings—the section 411(a) requirement of registration as a prerequisite to suit—threatens to undermine this successful registration system. The committee recognizes that the resolution of this issue is a difficult task. Although the Copyright Office has commissioned a voluminous study ("the King study") on user attitudes toward the registration system, it candidly admits that the results of that study shed no light upon the relative power of the different incentives for registration. Since it is unknown why virtually every significant work is registered today, it is difficult to determine how the adjustment of the incentives for registration will affect registration behavior.

The Copyright Office concludes from this that "the incentives to register are, in essence, a bundle. The removal of one incentive will likely result in the loss of some registrations . . . The King study analyzed the registration issues in terms of the bundle of rights. Neither King nor any other study has made an effort to gauge the consequences of eliminating one of the incentives." Responses of March 31, 1988, at 13–14.

Rather than simply conclude that the "bundle" of copyright incentives is inviolate, the committee has considered how the elimination of the section 411(a) requirement of registration as a prerequisite to copyright enforcement is likely to affect registration behavior. It has concluded that the impact is likely to be minimal.

If S. 1301 is enacted, a copyright proprietor who is unable or unwilling to seek registration of his claim will, unlike under current law, be able to file a lawsuit for infringement. But the proprietor of an unregistered work will remain at a substantial disadvantage in the ensuing litigation as compared to the position he or she would occupy had the work been registered. The proprietor, as the plaintiff, will face the task of convincing the court that the work is indeed entitled to copyright protection under U.S. law. The proprietor will assume the burden of proving authorship of the work, and, for a published work, establishing the origin of the work in either the United States, or a country with which the United States has either multilateral or bilateral copyright relations, or demonstrating some other basis upon which the court's enforcement powers under U.S. law may be invoked. Of course, if the work had been registered in a timely fashion, the plaintiff could have made out a *prima facie* case on all these points—indeed, on the entire issue of the validity of the claimed copyright—simply by presenting a certificate of registration to the court under section 410(c), which is unaffected by S. 1301.[5]

Assuming that the proprietor of an unregistered work were able to prove these facts without the benefit of a registration certificate, and that the claimed infringement were also proven, the plaintiff would be entitled to those actual damages flowing from the infringement. Under the traditional principles of equity, and the applicable statutory provisions (17 USC 502), the plaintiff could seek an injunction, and other equitable relief provided by the statute. However, the plantiff would not be entitled to the statutory damages set forth in section 504(c) of the Act, as doubled by enactment of S. 1301. Nor could the plantiff seek to have the infringer held liable for the plaintiff's attorney's fees. These elements of relief, which Congress has provided in order to encourage enforcement of copyright and make more claims viable subjects of enforcement litigation, would remain available only with respect to works that had been registered with the Copyright Office. This is in accordance with the provisions of 17 USC 412, which S. 1301 would not amend.

According to the figures provided by the Copyright Office, a total of thirteen infringement actions were filed during the past five years by copyright claimants whose registration applications had been refused. It stands to reason that the elimination of section 411(a) would be likely to increase this level of litigation with respect to unregistered works from the current level of two or three per annum. But because of the retention—and, in the case of statutory damages, the enhancement—of the remaining statutory incentives for registration, it appears exceedingly unlikely that this increase will be great in the context of the roughly 2000 copyright infringement lawsuits filed annually.

Consequently, to the extent that the prospect of future litigation is a motivating factor in registrations, it is unlikely that many copyright claimants would choose to forego registration, given the attendant increased difficulties they would encounter in seeking to prove and to obtain redress for infringements. Of course, to the extent that registrations are motivated by other reasons, such as sound business practices and personal considerations, elimination of section 411(a) would have no impact on registration volume whatsoever.

As introduced, S. 1301 contained additonal statutory incentives for registration. As Senator Leahy explained in his statement to the Senate, these additional incentives were proposed in response to the Copyright Office's fear that elimination of section 411(a) would cause a substantial degradation of the registration system. As Senator Leahy noted:

---

[5] In response to Senator Leahy's questions, the Register stated that "another consequence of eliminating the section 411(a) incentive would be to thrust upon the defendant's counsel the task of raising the issue of foreign ineligibility under section 104 of Title 17." March 31, 1988 Responses at 15-16. While all unpublished works are, and will remain, protectible under section 104(a), regardless of the author's nationality, the plaintiff in all events must bear the burden of proving eligibility of a published work under section 104(b). The *prima facie* effect of a registration certificate results in the shift of the burden of going forward on this issue to the defendant. With or without such a certificate, the burden of proof remains on the plaintiff throughout. S. 1301 does not change the allocation of these burdens.

> [I]f the Register's prediction is correct, the consequences would be undesirable. It is certainly worth exploring ways to strengthen the incentives to register that remain in our law even after eliminating the one incentive that is incompatible with the standards of the Berne Convention.
>
> Accordingly, my bill takes up the Register's plea to fashion a new leg for the three-legged stool. It . . . proposes additional incentives for timely registration by all copyright claimants. These include: the impositon of a registration requirement for cirminal enforcement of a copyright; the prospective limitation of statutory damages and attorney's fees as remedies for copyright infringement of a published work to instances in which the work is registered within 5 years after publication; a doubling of the levels of statutory damages . . . ; and enhanced penalties for failure to deposit works with the Library of Congress.

133 Cong. Rec. S 7370 (daily ed., May 29, 1987).

The subcommittee considered all these additional incentives, but ultimately decided to reject all but one of them. The Copyright Office testified that "whether these incentives would preserve all the benefits of the present system is uncertain." Oman Statement, at 16. The committee's decision not to include most of these additional incentives is not based on the view that they are insufficient substitutes for section 411(a), but rather that they could unnecessarily penalize authors who fail to register their works, or to do so in a timely manner. The committee further concluded that these additional incentives are unnecessary in order to prevent degradation of the registration system, since it is not persuaded that elimination of section 411(a) is likely to have that effect. The amended bill does include one of Senator Leahy's proposed additional incentives: the doubling of statutory damages from the levels established in the 1976 Copyright Act. As Senator Leahy noted, this change "not only increases the incentive to register, but also takes into account inflation since these levels were originally established in 1976." 133 Cong. Rec. at S 7370 (daily ed., May 29, 1987). The Copyright Office has previously testified that a doubling of statutory damages would be justified on inflation grounds. [Cite: 99th Cong. oversight hearings, Criminal and Civil Copyright Enforcement]

In assessing the likely impact of any change in section 411(a) on the volume of copyright registrations, the committee has taken into account the role of the registration system in maintaining the comprehensive collections of the Library of Congress. As the Register of Copyrights observed in his testimony:

> [R]egistration also necessarily requires a deposit of actual copies or phonorecords or of appropriate identifying material. These deposits may be selected by the Library of Congress for its collections, and they represent the principal copyright law source for acquisitions by the Library.

Statement of Ralph Oman, February 18, 1988, at 18. It follows from the committee's conclusion that the elimination of section 411(a) is unlikely to have much effect on registration behavior that such a change is also unlikely to have much impact on this element of the

Library's acquisitions program. Of course, the Library has other means of acquiring works, including the mandatory deposit requirements of section 407 of the Copyright Act, and non-copyright means. The record before the committee does not clearly reflect the extent to which the Library is dependent upon the submission to the Copyright Office of works sought to be registered, as contrasted with these other means of acquisition.

The Library's use of "registration deposit" to acquire works for its collection is a useful feature of the current registration system. For the reasons stated above, the committee believes that it is likely to be equally useful whether or not section 411(a) is modified or eliminated. At the same time, if section 411(a) is incompatible with the standards of the Berne Convention, the argument that its elimination from our law might have some marginal impact on the acquisition practices of the Library must be considered in light of the benefits of Berne adherence. These benefits are likley to include some increase in the publication of foreign works in the United States, particularly works originating in countries with whom we do not now have copyright relations because of our absence from Berne. The strengthening of the world copyright system, which will be a by-product of U.S. adherence to Berne, should bring more foreign works into the U.S. market, just as it will help to open foreign markets to U.S. works. These new foreign works, if published in the United States, will come within the scope of the mandatory deposit requirement. More importantly, there is no basis for assuming that foreign publishers will be less eager to protect their works against infringement in this country than are domestic publishers. Like their U.S. brethren, foreign publishers will have powerful incentives to register their works with the Copyright Office, and thus make them available to the library through "registration deposit," even if section 411(a) is eliminated from our law. Thus, enactment of S. 1301 may on balance enhance, rather than diminish, the usefulness of this means of acquisition by the Library.[6]

ii. Impact on courts.—The second major policy argument against elimination of section 411(a) is that the requirement of registration as a precondition of an infringement suit "simplif[ies] and expedite[s] litigation," Oman Senate Testimony at 16, and that therefore its elimination will be burdensome to the federal courts. As the Register of Copyrights explained in his responses to Senator Leahy's questions:

> If section 411(a) is eliminated as an incentive, courts will be asked to rule on an increased number of novel copyright issues, without benefit of an administrative record to expedite their proceedings. Copyright owners with questionable claims will seek to enforce rights by asking the courts—often in the context of shortfused temporary re-

---

[6] It has been argued that foreign works, although they now make up only 5% of the 600,000 annual copyright registrations, are "qualitatively extremely important acquisitions" from the perspective of the Library. Oman 3/31 responses, at 13. Nothing in the record before this Committee provides any basis for assuming that the elimination of the requirement of registration as a prerequisite to copyright enforcement will have a disproportionate impact on the volume of registrations of these "qualitatively important" works.

> straining order or a preliminary injunction—to rule directly on their claims without risking the negative implications that would arise from a possible Copyright Office denial of registration. Attorneys with weak cases, or novel cases would have a powerful incentive to bypass the Copyright Office in precisely the kind of case in which the courts want to have the advice of an expert agency.

March 31, 1988, Responses, at 15.

It appears to the committee that this policy argument underestimates the capabilities of the federal courts, and misconceives their role, in the enforcement of the copyright law. After all, it is the courts, not the Copyright Office, that interpret and apply the copyright law to disputes arising from alleged infringements. While Congress could have chosen to give the Copyright Office the power to conduct administrative proceedings to decide such disputes, it has never done so. Rather, it has assigned that role to the courts, in adversary proceedings in which one party shoulders the burden of proving his entitlement to relief.

As discussed above, even without the gate-keeping function of section 411(a), the law gives copyright claimants strong disincentives to come to court without a registration certificate, which, if timely obtained, establishes a prima facie case of key elements of the plaintiff's claim for relief. See 17 USC 410(c). In the vast majority of cases, plaintiffs will continue to file cases armed with that certificate; and its absence alone, without any expert opinion from the Copyright Office appearing on the face of the pleadings, will alert the courts to the need to put the plaintiff to his proof of the claim that he is the author of the work and that it constitutes copyrightable subject matter.

Indeed, under current law, the courts are already required to undertake an independent determination of copyrightability. Courts can—and do—decide that, despite the issuance of a registration certificate, the plaintiff is not entitled to claim the protection of the copyright laws, just as they can—and do—decide that the Office's refusal to issue a registration certificate does not foreclose the plaintiff from proving that the work is copyrightable. Of course, the Office's opinions are often helpful to the courts in making these determinations, and they will continue to serve that function in the overwhelming majority of cases, even if section 411(a) is eliminated. But the traditional adversary system of resolving disputes, rather than the ex parte proceedings of the Copyright Office in deciding whether or not to issue a certificate of registration, has, and will continue to have, the final word.

Of course, nothing in this legislation would prevent the courts from seeking the opinion of the Copyright Office even in those rare cases in which an infringement action is filed with respect to a work which has never been submitted for registration. Similarly, nothing in this bill would inhibit the ability of the Copyright Office to offer its expert opinion, whether by way of formal intervention, *amicus curiae status, or other means, even in cases in which it has not been invited by the court or the parties to do so.*[7]

Finally, the fact that the courts may be required, as they are today, to rule on disputed claims "in the context of a shortfused temporary restraining order" will not impede the discharge of their responsibility to provide definitive interpretations of the copyright law. Under current law, unaffected by this legislation, the determination made by the Copyright Office in the registration process is no more entitled to determinative weight at the inception of a lawsuit than it is at any other stage of the proceedings. The responsibility for ruling on applications for temporary relief, using traditional equity principles and applicable statutes and court rules, remains the court's responsibility; and the burden remains on the plaintiff to justify any claim for such a remedy.

The federal courts rule every day on such applications, some of them involving legal issues equally as complex and specialized as those presented in copyright infringement cases. In making such rulings in copyright cases brought after the enactment of this legislation, the court will continue to have before it, in the vast majority of the cases, the expert opinion of the Copyright Office. The committee is not prepared to conclude that the courts will be unable faithfully to discharge their responsibilities in those rare cases in which that opinion is not reflected in the papers before them.

In short, the committee concludes that the elimination or modification of section 411(a), by itself, is unlikely to make the litigation of copyright cases less efficient or expeditious, and that it is not likely to have a deleterious effect on the copyright jurisprudence developed by the federal courts in such cases.

3. Recordation

Section 205 of the Copyright Act requires the Copyright Office to record any document submitted to it that constitutes a transfer of copyright ownership "or other document pertaining to a copyright." 17 U.S.C. 205(a). Recordation has three effects. First, it is a precondition to the initiation of an infringement action by a purported transferee of the copyright or of any exclusive right thereunder. 17 U.S.C. 205(d). Second, if the recorded document meets certain requisites and pertains to a work which has been registered, the recordation "gives all persons constructive notice of the facts stated in the recorded document." 17 U.S.C. 205(c). Third, if a recorded document meets the standards for constructive notice effect under section 205(c), it takes priority over subsequent conflicting transfers of copyright ownership if recordation has been made in a timely fashion. 17 U.S.C. 205(e).

Only the first effect of recordation has been questioned as a formality which may be prohibited by Berne. (The second two effects, even though they depend upon the existence of registration, do not preclude enforcement of a claim airsing from an unrecorded transfer, although they do provide strong incentives for recordation and, indeed, for registration. In this sense, they are analogous to the statutory incentives for registration, such as statutory damages and attorneys' fees, which the committee has concluded are compatible with Berne.)

---

[7] In this regard, the committee notes that section 508 of the Copyright Act requires the clerks of U.S. courts to give notice to the Copyright Office within one month of the institution of any copyright infringement lawsuit. This provision is unaffected by the current legislation, and the committee expects that it will be scrupulously observed.

The committee concludes that the recordation requirement of section 205(d), at least as applied to foreign works originating in Berne countries, is incompatible with the Berne prohibition against formalities as preconditions for the "enjoyment and exercise" of copyright. Although the Copyright Office evidently has no discretion, unlike in registration, to prevent the transferee of copyright ownership from satisfying this precondition, the fact remains that a transferee claiming under an unrecorded document is effectively precluded from enforcing his or her claim, and thus from enjoying and exercising his or her rights, within the meaning of Article 5(2) of Berne.

JUKEBOX PROVISIONS

On January 1, 1978, the U.S. Code for the first time provided specified exclusive rights in nondramatic works that are publicly performed "by means of a phonorecord player." Pursuant to 17 U.S.C. 116, a jukebox operator is required to deposit a fixed annual statutory royalty fee with the Register of Copyrights in order to use copyrighted phonorecords. This compulsory license for jukebox performances has been cited in the past as an obstacle to U.S. adherence to the Berne Convention.

Article 11(1) of the Berne Convention states that "[a]uthors of . . . musical works shall enjoy the exclusive right authorizing . . . the public performance of their works." This exclusive right extends to public performance "by any means or process . . ." Accordingly, the right of a composer over the public performance of his music in the Berne Convention encompasses performance by means of recordings. Thus, on its face, Article 11(1) does not accommodate the jukebox compulsory license in the U.S. Code.

Although the provisions of Article 11(1) do not provide for compulsory licenses for the public performance of music, other provisions of the Convention, such as those in Article 11bis governing broadcasting rights, expressly permit some compulsory licenses. Article 11bis permits compulsory licenses for broadcasting which guarantee "authors of literary and artistic works" an "equitable remuneration . . . fixed by a competent authority" and which have no extraterritorial application and no prejudicial effects on moral rights. Article 11bis(2). Accordingly, the committee's conclusion that the jukebox licensing provisions must be changed does not mean that other compulsory licenses which are specifically sanctioned by the Berne Convention need to be altered. The cable compulsory license at 17 U.S.C. 111, for instance, is governed by the provisions of Article 11bis(2) of Berne. Similarly, the mechanical license in Section 115 of the Copyright Act is governed by Article 13(1) which permits compulsory licenses to record specified musical works. The Berne Convention permits compulsory licenses only in certain instances and not in others.

Witnesses before the Subcommittee on Patents, Copyrights and Trademarks have testified about the need for a change in U.S. compulsory licensing for jukeboxes in order to comply with Berne's provisions governing public performances.

In the subcommittee's 1985 hearings on U.S. Adherence to Berne, Acting Register of Copyrights Donald C. Curran maintained that the jukebox license "appears contrary to Berne." Senate Hearings, 99th Congress, at 54. Moreover, the Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention reached the same conclusion. Id., at (446-52) On February 18, 1988, Mr. Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services, reiterated the Copyright Office's conclusion that the Berne Convention required the owners of musical compilations to have an "exclusive" right of performance.

In its 1986 hearing, the subcommittee also received testimony from Mr. Elroy Wolff, representing the Amusement and Music Operators Association, that the jukebox industry was in decline. (see Statement of Elroy Wolff, Senate Hearings, 99th Congress, at 388-399) Accordingly, the committee was aware of the need to protect the health of the domestic jukebox industry.

Thus, both S. 1301, introduced by Senator Leahy, and S. 1971, introduced by Senator Hatch on behalf of the Reagan Administration, replaced the compulsory license with provisions adequately protecting the domestic jukebox industry, but also complying with Berne. The two bills differ in only minor details.

As reported by the committee, S. 1301 allows copyright owners and the jukebox operators to negotiate voluntary licensing agreements. As long as the parties conclude suitable agreements, through voluntary negotiations, the new licensing agreements are to be given effect "in lieu of any otherwise applicable determination by the Tribunal." Also, S. 1301 permits the parties to resolve any contractual disputes through arbitration, if necessary, and does not allow the Tribunal to "conduct any ratemaking activity with respect to coin-operated phonorecord players unless "the parties are unable to come to an agreement. Until the parties reach a voluntary arrangement, "the terms of the compulsory license, with respect to the public performance of nondramatic musical works by means of coin-operated phonorecord players, that is in effect on the day before the effective date [of this legislation] shall remain in force."

With respect to the safety net provisions—which apply in the event a voluntary agreement cannot be reached or lapses—Mr. Oman testified that S. 1301 satisfies the requirements of the Berne Convention by elevating negotiated licenses between copyright owners and jukebox owners above the compulsory licenses in the current law. He noted that "some Berne Union countries do regulate organizations representing authors and copyright proprietors, including the setting of fees" and that the safety net provision can be "justified as analogous to regulation of collective societies." Thus, he concluded, S. 1301 was compatible with Berne.

S. 1301, as reported, would permit negotiations and agreements by the parties "notwithstanding any provision of the antitrust laws." The intent of this language is to ensure that antitrust laws do not bar voluntary negotiations on licensing agreements.

All differences between S. 1301 and S. 1971 were quickly resolved by the committee in an effort to comply with Berne and simultaneously ensure continuance of fair accommodations between jukebox owners and copyright holders. Accordingly, the final provisions of S. 1301, as amended by the committee, are strikingly similar to S. 1971 and the original version of S. 1301. With these changes in place, the committee concludes that U.S. domestic jukebox law is fully in compliance with the requriements of the Berne Convention.

EFFECTIVE DATE

Section 13 specifies that the Act and the amendments made by the Act to title 17, United States Code, take effect on the same day on which the Berne Convention enters into force for the United States. Based on recommendations from the State Department, the committee concludes that the Act and the amendments made by the Act should take effect on the same day the treaty enters into force for the United States (see April 7, 1988 letter from Betsy R. Warren, Acting Assistant Secretary for legislative affairs, U.S. Department of State to Congressman Robert W. Kastenmeier, April 24, 1988 letter from J. Edward Fox, Assistant Secretary for Legislative for Legislative Affairs, U.S. Department of State to Senator Dennis DeConcini).

Once the Berne Convention enters into force for the United States, all States adhering to the Berne Convention are required to protect works of American authors. However, an author from a State adhering to the Berne Convention is not entitled to Berne protection in the U.S. until the U.S. law is changed according to the terms of this Act. Thus, if the Berne Convention enters into force for the U.S. before the Act and the amendments made by the Act take effect, the works of American authors would be entitled to protection in all nations that are members of the Berne Convention even though an author from a State adhering to the Berne Convention would not be entitled to protection under the U.S. law.

Similarly, if the Act and the amendments made by the Act were to take effect any time before the Berne Convention enters into force for the U.S., the U.S. would be obligated to protect the work of an author from a State adhering to Berne even though American authors would not be entitled to protection from other countries by virtue of the Berne Convention.

In order to eliminate any uncertainty or inequity that might arise as a result of a gap between the time the U.S. law is changed pursuant to the terms of this Act, and the time the Berne Convention enters into force for the United States, S. 1301 provides that the Act and the amendments made by the Act will take effect on the same day the treaty enters into force for the United States.

Moreover, the committee has concluded that if the Act and the amendments made by the Act take effect on the same day the treaty enters into force for the United States, it further discredits any assertion that the Berne Convention is in any way self-executing. (see discussion of section 2 of S. 1301, *infra.*)

A. PRECEDENTS

It is not at all uncommon for statutes which implement obligations under international treaties to become effective at the same time the particular treaty has entered into force for the United States.

The best example in the intellectual property field may be P.L. 83-743, which amended the U.S. Code to fulfill U.S. obligations under the Universal Copyright Convention (UCC). Section 4 provided that the Act, "shall take effect upon the coming into force of the Universal Copyright Convention in the United States of America." The Act passed the House of Representatives on August 3, 1954 and the Senate on August 18, 1954. The President signed it into law on August 31, 1954.

The Senate gave its advice and consent to the UCC treaty on June 25, 1954. The President ratified the treaty on November 5, 1954 and had the instrument deposited on December 6, 1954. In accordance with Article IX of the UCC, the UCC entered into force for the U.S. and eleven other countries on September 16, 1955. Accordingly, the changes to the U.S. Code contained in the Act went into effect on September 16, 1955, three months after the deposit of twelve ratifications, acceptances or accessions.

Another example in the intellectual property field is P.L. 99-616, which amended the patent laws in order to implement U.S. withdrawal of a declaration under article 64(1)(a) of the Patent Cooperation Treaty. Section 9 of the Act provided that, "Sections 2 through 8 of this Act shall come into force on the same day as the effective date of entry into force of Chapter II of the Patent Cooperation Treaty with respect to the United States, by virtue of the withdrawal of the declaration under article 64 (of the Treaty) . . ." The Act passed the House of Representatives on October 17, 1986 and the Senate on October 16, 1986. The President signed it into law on November 6, 1986.

The Senate gave its advice and consent to U.S. withdrawal of the declaration on October 9, 1986. The President ratified the withdrawal on March 27, 1987 and had the instrument deposited on April 1, 1987. Article 64 of the Treaty specified that the withdrawal become effective three months after the date of the deposit. Because the Patent and Trademark Office indicated that it would not be ready to begin processing international applications under Chapter II of the treaty until July 1, 1987, the Executive specifically chose to deposit the instrument on April 1, 1987. As a result, the withdrawal became effective, and the changes to the U.S. Code contained in the Act went into effect, on July 1, 1987.

B. ESTABLISHING THE EFFECTIVE DATE

As indicated in the April 29, 1988 letter from J. Edward Fox to Senator DeConcini, once implementing legislation has been enacted, the Senate has given its advice and consent to U.S. accession to the Convention, and the President has signed the instrument of accession, the Executive will deposit the instrument of accession with the Director General of the World Intellectual Property Organization. The instrument, which will be prepared by the Department of State, will indicate that the Convention shall enter into force for the United States on a specified date, which will be approximately four months from the date the President signs the instrument. Within a short time after the instrument has been deposited, the Executive will ensure that public notice is given in the *Federal Register* to indicate the exact date on which the Convention enters into force and the changes to the United States Code contained in the Act go into effect.

IV. VOTE OF COMMITTEE

On April 13, 1988, with a quorum present, the Subcommittee on Patents, Copyrights and Trademarks voted unanimously to report S. 1301 to the Committee on the Judiciary, with an amendment in the nature of a substitute.

On April 14, with a quorum present, the Committee on the Judiciary, by voice vote, unanimously ordered the bill, S. 1301 as amended, favorably reported.

V. TEXT OF S. 1301

SECTION 1. SHORT TITLE.

This Act may be cited as the "Berne Convention Implementation Act of 1988".

SEC. 2. DECLARATIONS.

The Congress makes the following declarations:

(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1986, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and Laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

SEC. 3. CONSTRUCTION OF THE BERNE CONVENTION.

(a) Relationship With Domestic Law.—The provisions of the Berne Convention—

(1) shall be given effect under title 17, United States Code, as amended by this Act, and any other relevant provision of Federal or State law, including common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) Certain Rights Not Affected.—Any right of an author of a work, whether claimed under Federal, State, or common law, to claim authorship of the work, or to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, the adherence of the United States thereto, or the satisfaction of United States obligations thereunder.

SEC. 4. SUBJECT MATTER AND SCOPE OF COPYRIGHTS.

Chapter 1 of title 17 of the United States Code is amended—

(1) in section 101—

(A) in the definition of "Pictorial, graphic, and sculptural works" by striking out in the first sentence "technical drawings, diagrams, and models" and inserting in lieu thereof "diagrams, models, and technical drawings, including architectural plans"; and

(B) by inserting between the definition of "Audiovisual works" and the definition of "The best edition", the following:

"The 'Berne Convention' is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

"A work is a 'Berne Convention work' if—

"(1) in the case of an unpublished work, one or more of the authors is a national of a State adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a State adhering to the Berne Convention on the date of first publication;

"(2) the work was first published in a State adhering to the Berne Convention, or was simultaneously published in a State adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention;

"(3) in the case of an audiovisual work—

"(A) if one or more of the authors is a legal entity, that author has its headquarters in a State adhering to the Berne Convention; or

"(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a State adhering to the Berne Convention; or

"(4) in the case of a pictorial, graphic, or sculptural work, such work is incorporated in a building or other structure located in a State adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a State adhering to the Berne Convention is considered to be a national of that State. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more nations if its dates of publication are within 30 days of one another.";

(2) in section 104(b)—

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by inserting after paragraph (3) the following new paragraph (4):

"(4) the work is a Berne Convention work; or";

(3) in section 104 by adding at the end thereof the following:

"(c) EFFECT OF BERNE CONVENTION.—No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the United States adherence thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon the provisions of the Berne Convention, or United States adherence thereto.";

(4) in section 108(a)—

(A) by inserting after the semicolon at the end of paragraph (1), "and";

(B) by striking out "; and" at the end of paragraph (2) and inserting in lieu thereof a period; and

(C) by repealing paragraph (3); and

(5) by amending section 116 to read as follows:

"§ 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

"(a) This section applies to any nondramatic musical work embodied in a phonorecord.

"(b)(1) In the case of a work to which this section applies, the exclusive right under paragraph (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited to the extent that paragraph (2) applies.

"(2) If, one year after the effective date of the Berne Convention Implementation Act of 1988, the Copyright Royalty Tribunal certifies by publication in the Federal Register that negotiated licenses authorized by subsection (c) have not come into effect so as to provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the one-year period ending on the effective date of such Act, then section 116 as in effect on the day before the effective date of such Act shall be effective with respect to musical works that are not the subject of such negotiated licenses.

"(c)(1) Notwithstanding any provision of the antitrust laws, any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

"(2) Parties to such a negotiation, within such time as may be specified by the Copyright Royalty Tribunal by regulation, may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice to the Copyright Royalty Tribunal of any determination reached by arbitration and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.

"(d) License agreements between one or more copyright owner and one or more operator of coin-operated phonorecord players, which are negotiated in accordance with subsection (c), shall be given effect in lieu of any otherwise applicable determination by the Copyright Royalty Tribunal.

"(e) Not later than 60 days after the effective date of the Berne Convention Implementation Act of 1988, if the Chairman of the Copyright Royalty Tribunal has not received notice, from copyright owners and operators of coin-operated phonorecord players referred to in subsection (c)(1), of the date and location of the first meeting between such copyright owners and such operators to commence negotiations authorized by subsection (c), the Chairman shall announce the date and location of such meeting. Such meeting may not be held more than 90 days after the effective date of such Act.

"(f) The Copyright Royalty Tribunal shall not conduct any ratemaking activity with respect to coin-operated phonorecord players unless, at any time more than one year after the effective date of the Berne Convention Implementation Act of 1988, the negotiated licenses adopted by the parties under this section do not provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the one-year period ending on the effective date of such Act.

"(g) Until such time as licensing provisions are determined by the parties under this section, the terms of the compulsory license, with respect to the public performance of nondramatic musical works by means of coin-operated phonorecord players, which is in effect on the day before the effective date of the Berne Convention Implementation Act of 1988, shall remain in force. If the negotiated licenses authorized by this section come into force so as to supersede previous determinations of the Copyright Royalty Tribunal, as provided in subsection (d), but thereafter are terminated or expire without replacement by subsequent agreements, then section 116 as in effect on the day before the effective date of such Act shall be effective with respect to musical works that are not the subject of such negotiated licenses.

"(h) As used in this section, the following terms and their variant forms mean the following:

"(1) A 'coin-operated phonorecord player' is a machine or device that—

"(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

"(B) is located in an establishment making no direct or indirect charge for admission;

"(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

"(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

"(2) An 'operator' is any person who, alone or jointly with others—

"(A) owns a coin-operated phonorecord player; or

"(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

"(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.".

SEC. 5. RECORDATION.

Section 205 of title 17, United States Code, is amended—

(1) by striking out subsection (d); and

(2) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

SEC. 6. PREEMPTION WITH RESPECT TO OTHER LAWS NOT AFFECTED.

Section 301 of title 17, United States Code, is amended by adding at the end thereof the following:

"(e) The scope of preemption under this section shall be neither expanded nor reduced by virtue of, or in reliance upon, the adherence of the United States to the Berne Convention, or the satisfaction of United States obligations thereunder.".

SEC. 7. NOTICE OF COPYRIGHT.

(a) VISUALLY PERCEPTIBLE COPIES.—Section 401 of title 17, United States Code is amended—

(1) in subsection (a) by striking out "shall be placed on all" and inserting in lieu thereof "may be placed on";

(2) in subsection (b) by striking out "The notice appearing on the copies" and inserting in lieu thereof "If a notice appears on the copies, it";

(3) by striking out "The notice" in subsection (c), and inserting in lieu thereof "Any notice referred to in subsection (a)"; and

(4) by adding at the end the following:

"(d) EVIDENTIARY WEIGHT OF NOTICE.—If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on 'innocent infringement' in mitigation of actual or statutory damages.".

(b) PHONORECORDS OF SOUND RECORDINGS.—Section 402 of title 17, United States Code, is amended—

(1) in subsection (a) by striking out "shall be placed on all" and inserting in lieu thereof "may be placed on";

(2) by striking out "The notice appearing on the phonorecords" in subsection (b), and inserting in lieu thereof "If a notice appears on the phonorecords, it";

(3) by striking out "The notice" in subsection (c), and inserting in lieu thereof "Any notice referred to in subsection (a)"; and

(4) by adding at the end thereof the following new subsection:

"(d) EVIDENTIARY WEIGHT OF NOTICE.—If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on 'innocent infringement' in mitigation of actual or statutory damages.".

(c) PUBLICATIONS INCORPORATING UNITED STATES GOVERNMENT WORKS.—Section 403 of title 17, United States Code, is amended by amending such section to read as follows:

"Sections 401(d) and 402(d) shall not apply to a work published in copies or phonorecords consisting preponderantly of one or more works of the United States Government unless the notice of copyright appearing on the published copies or phonorecords to which a defendant in the copyright infringement suit had access includes a statement identifying, either affirmatively or negatively, those portions or the copies or phonorecords embodying any work or works protected under this title.".

(d) NOTICE OF COPYRIGHT; CONTRIBUTIONS TO COLLECTIVE WORKS.—Section 404 of title 17, United States Code, is amended—

(1) in subsection (a), by striking out "to satisfy the requirements of sections 401 through 403", and inserting in lieu thereof "to invoke the provisions of section 401(d) or 402(d), as applicable"; and

(2) in subsection (b), by striking out "Where" and inserting in lieu thereof, "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where".

(e) OMISSION OF NOTICE.—Section 405 of title 17, United States Code, is amended—

(1) in subsection (a), by striking out "The omission of the copyright notice prescribed by" and inserting in lieu thereof "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, the omission of the copyright notice described in";

(2) in subsection (b), by striking out "omitted," in the first sentence and inserting in lieu thereof "omitted and which was publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988,"; and

(3) by amending the heading of section 405 to read as follows:

"§ 405. Notice of Copyright: Omission of Notice on Certain Copies and Phonorecords"

(f) ERROR IN NAME OR DATE.—Section 406 of title 17, United States Code, is amended—

(1) in the section heading by inserting "on certain copies and phonorecords" after "date";

(2) in subsection (a) by striking out "Where" and inserting in lieu thereof "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where";

(3) in subsection (b) by inserting "before the effective date of the Berne Convention Implementation Act of 1988" after "distributed"; and

(4) in subsection (c)—

(A) by inserting "before the effective date of the Berne Convention Implementation Act of 1988" after "publicly distributed"; and

(B) by inserting after "405" the following: "as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988".

(g) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 4 of title 17, United States Code, is amended by striking out the items relating to sections 405 and 406 and inserting in lieu thereof the following:

"405. Notice of copyright: Omission of notice on certain copies and phonorecords.
"406. Notice of copyright: Error in name or date on certain copies and phonorecords.".

SEC. 8. DEPOSIT OF COPIES OR PHONORECORDS FOR LIBRARY OF CONGRESS.

Section 407 of title 17, United States Code, is amended in subsection (a), by striking out "with notice of copyright".

SEC. 9. COPYRIGHT REGISTRATION.

(a) REGISTRATION IN GENERAL.—Section 408 of title 17, United States Code, is amended—

(1) in subsection (a), by striking out "Subject to the provisions of section 405(a), such" in the second sentence and inserting in lieu thereof "Such";

(2) in subsection (c)(2)—

(A) by striking out "all of" in the matter before subparagraph (A);

(B) by striking out subparagraph (A); and

(C) by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

(b) INFRINGEMENT ACTIONS.—

(1) REGISTRATION AS A PREREQUISITE.—Section 411 of title 17, United States Code, is amended to read as follows:

"§ 411. Registration and infringement actions

"(a) Registration is not a prerequisite to the institution of a civil action for infringement of copyright.

"(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner serves notice upon the infringer, not less than 10 or more than 30 days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work.".

(2) TABLE OF SECTIONS.—The table of sections at the beginning of chapter 4 of such title 17, United States Code, is amended by striking out the item relating to section 411 and inserting in lieu thereof the following:

"411. Registration and infringement actions.".

SEC. 10. COPYRIGHT INFRINGEMENT AND REMEDIES.

(a) INFRINGEMENT.—Section 501(b) of title 17, United States Code, is amended by striking out "sections 205(d) and 411," and inserting in lieu thereof "section 411(b),".

(b) DAMAGES AND PROFITS.—Section 504(c) of title 17, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking out "$250", and inserting in lieu thereof "$500"; and

(B) by striking out "$10,000", and inserting in lieu thereof "$20,000"; and

(2) in paragraph (2)—

(A) by striking out "$50,000.", and inserting in lieu thereof "$100,000."; and

(B) by striking out "$100.", and inserting in lieu thereof "$200.".

SEC. 11. COPYRIGHT ROYALTY TRIBUNAL.

Chapter 8 of title 17, United States Code, is amended—

(1) in section 801, by adding at the end of subsection (b) the following: "In determining whether a return to a copyright owner under section 116 is fair, appropriate weight shall be given to—

"(i) the rates most recently determined by the Tribunal to provide a fair return to the copyright owner, and

"(ii) the rates contained in any license negotiated under the authorization of section 116 of this title."; and

(2) in section 804, by striking out the period at the end of section 804(a)(2)(C) and inserting in lieu thereof the following: ", and at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire without replacement by subsequent agreements; and

"(3) if negotiated licenses authorized by section 116 come into force so as to supersede previous determinations of the Tribunal, as provided in section 116(d), but thereafter are terminated or expire without replacement by subsequent agreements, the Tribunal shall, upon petition of any party to such terminated or expired negotiated license agreement, promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such interim royalty rate or rates shall remain in force until the conclusion of proceedings to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(d). The Tribunal may order that the royalty rates finally determined by the Tribunal to be reasonable shall be retroactive to the date such previously negotiated license agreements were terminated or expired.".

SEC. 12. WORKS IN THE PUBLIC DOMAIN.

Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.

SEC. 13. EFFECTIVE DATE; EFFECT ON PENDING CASES.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act take effect on the same day the Berne Convention (as defined in section 101 of title 17, United States Code) enters into force with respect to the United States.

(b) EFFECT ON PENDING CASES.—Any cause of action arising under title 17, United States Code, before the effective date of this Act shall be governed by the provisions of such title as in effect when the cause of action arose.

VI. SECTION-BY-SECTION ANALYSIS

Section 1—Short Title

The Act may be cited as the "Berne Convention Implementation Act of 1988."

Section 2—Declarations

Section 2(1)—Berne is not Self-executing

Section 2(1) of S. 1301 constitutes a Congressional declaration that the Berne Convention is not self-executing under U.S. law.

Testimony before the subcommittee has made it amply clear that the question of whether a treaty is self-executing is a question of U.S. law to be decided by U.S. courts. One of the most authoritative sources to which the courts may look in answering this question are declarations of legislative intent accompanying the passage of implementing legislation. The committee considers it advisable to include these declarations in the legislation in order to make it absolutely clear to the courts that any claim that Berne is self-executing should be rejected. Rights and responsibilities of authors, copyright owners, users of copyrighted materials, and other parties must be resolved under appropriate domestic law, not under Berne itself. Appropriate domestic law includes the Copyright Act, other federal and state statutes, and common law precedents that may be relevant to the issue under consideration.

Section 2(2)—Preeminence of Domestic Law

Section 2(2) constitutes a Congressional declaration that U.S. obligations under Berne may be performed only pursuant to domestic law.

Section 2(3)—Existing Law Satisified U.S. Obligations

Section 2(3) declares that existing law, along with the amendments made by this Act, satisfy U.S. obligations under Berne. No further rights or interests shall be recognized or created for that purpose. This is a further direction to the courts to apply U.S. law, and not the terms of the Berne Convention itself, in resolving copyright and copyright-related disputes within their jurisdiction. Of course, enactment of this legislation does not restrict the courts from their customary role of interpreting and applying the Copyright Act, other statutes, or common law principles, to the facts of particular disputes which may be before them. The committee intends that U.S. adherence to Berne, in and of itself, should have no impact, one way or the other, on the development of the law in this area.

Section 3—Construction of the Berne Convention

Section 3(a)—Preeminence of Domestic Law

Section 3(a)(1) restates the principle declared in section 2 that the Berne Convention shall be given effect under the Copyright Act (Title 17 of the U.S. Code) and any other relevant provision of federal, state, or common law. It explicitly instructs the courts to apply this principle as a rule of construction. Section 3(a)(2) makes explicit what is implicit in the foregoing: that the Berne Convention is not directly enforceable in U.S. courts.

Section 3(b)—Certain Rights not Affected

Section 3(b) addresses the effect of Berne adherence on the resolution of disputes under U.S. law with regard to the subject matter covered by Article 6b is of the Berne Convention: the so-called rights of paternity and integrity. Neither Berne adherence, nor the satisfaction of U.S. obligations under Berne, should be used by the courts as a justification either for expanding or reducing the recognition of these rights under U.S. law. The courts remain free, of course, to expand or reduce the recognition of these rights based on other principles of statutory construction or common law decision-making, wholly apart from U.S. adherence to Berne. This provision also restates the rule that the provisions of Berne itself may not be used as the basis for a decision in cases involving rights of paternity or integrity. (The general principle, stated in section 3(a)(2), is here applied to the specific issues of the rights of paternity and integrity.)

Section 4—Subject Matter and Scope of Copyrights

Section 4(1)—Architectural Works

Section 4(1) amends the defintion of "Pictorial, graphic, and sculptural works" contained in section 101 of Title 17, United States Code. The Act strikes from the definition the phrase, "technical drawings, diagrams, and models," and inserts in lieu thereof, "diagrams, models, and technical drawings, *including architectural plans* (emphasis added)."

The amendment made by this Act makes it clear that, "pictorial, graphic, and sculptural works," include architectural plans and merely codifies the current law governing architectural plans. Thus, it will continue to be an infringement to reproduce the architectural plans themselves without permission of the copyright holder. Simply to construct a building that is represented in copyrighted architectural plans remains subject, however, to 17 USC 113, which is not amended by S. 1301.

Section 4(1)—Berne Convention Work

Section 4 contains a definition of "Berne Convention work" in order to identify the conditions under which the United States will protect foreign works to which the Berne Convention applies. Section 104(b) of Title 17, United States Code, is amended to provide that "Berne Convention works" are among the works protected under Title 17. Thc conditions for protection are stated in the alternative, reflecting the broad criteria of eligibility in Articles 3 and 4 of the Berne Convention itself.

Paragraph (1) of the definition states the criterion of nationality of the author—unpublished works are protected if one or more of the authors is a national of a Berne member State, and published works are protected if one or more of the authors is a national of a Berne member State on the date of first publication. An author is a national of the State where he or she is domiciled or habitually resides.

Paragraph (2) of the definition sets out the criteria for determining the place of first publication. Under the Act, works will be protected by Title 17, United States Code, if they are published in a Berne member State, or if the first publication is made simultaneously in a Berne member State and a State that does not adhere to the Berne Convention. Under the terms of the Berne Convention, the two dates of publication must be within 30 days of each other to qualify as a simultaneous publication.

Paragraph (3) of the defintion sets out the criteria for determining whether an audiovisual work (as defined in section 101, Title 17) is a Berne Convention work. Where paragraphs (1) and (2) establish whether a work is a Berne Convention work based on the place of publication, paragraph (3) relies upon the author's headquarters, in the case of a legal entity, or the author's domicile or residence, in the case of an individual.

Paragraph (4) of the definition covers pictorial, graphic and sculptural works that are incorporated into a building or other structure located in a Berne member State. Paragraph (4) pertains to separately identifiable pictorial, graphic and sculptural works and does not in any way change the laws governing the copyrightability of buildings or other structures. It also has no application to a pictoral, graphic or sculptural work *not* incorporated in a building or structure.

Section 4(2)—Works Eligible for Protection

Section 4(2) of S. 1301 amends 17 USC 104, which lists the categories of works eligible for protection under U.S. law in terms of their national origin, to add "Berne Convention Works," as defined in 17 USC 101 as amended by section 4(1) of S. 1301, to the list of categories of published works eligible for protection.

Section 4(3)—Effect of the Berne Convention

Section 4(3) of S. 1301 amends section 104 of the Copyright Act to codify the principles expressed in the declarations in section 2, and the rules of construction in section 3. As with our adherence to the Universal Copyright Convention and other copyright treaties, neither the fact of U.S. adherence to the Berne Convention nor the Convention's provisions may be the basis for a claim in the United States of a right or interest in a work subject to copyright protection under the U.S. copyright law. The scope and application of such rights, whether they derive from the Copyright Act, other statutes, or common law, or even the existence of such rights in a case in which the existence of the right is contested, are unaffected by U.S. adherence to Berne or the provisions of the Berne Convention itself. The courts are to resolve issues of the existence, scope, or application of rights in works subject to copyright through the normal processes of statutory interpretation and the application of common law precedents, as appropriate, rather than by reference to the provisions of Berne or the fact of U.S. adherence to the Convention.

Section 4(4)—Reproduction of Works By Libraries and Archives

Section 4(4) of S. 1301 amends section 108 of the Copyright Act, which deals with reproduction of works by libraries and archives. 17 USC 108(a) declares that it is not an infringement of copyright for a library or archive to reproduce and distribute a single copy of a work under specified conditions. One of these conditions, set forth in section 108(a)(3), is satisfied if "the reproduction or distribution of the work includes a notice of copyright." Since, after enactment of S. 1301, copyright protection will be available for works distributed without notice of copyright, this provision in its current form is unnecessary and potentially confusing. Consequently, S. 1301 eliminates it.

However, the repeal of section 108(a)(3) should not be interpreted as authorizing or condoning the removal or obliteration of a copyright notice from a copy of a work before it is copied by a library or archive under section 108. Nor does the committee intend to disturb what it understands to be the prevailing current practice of many libraries and archives to mark copies distributed under the authority of section 108 in order to indicate that the material contained therein is subject to a claim of copyright protection, even if the actual material page or pages copied—for example, an excerpt from a scholarly journal—does not bear a notice of copyright.

Section 4(5)—Jukebox Provisions

S. 1301 creates a new section 116. Like the current Section 116, the new Section 116, as clarified by subsection (a), "applies to any nondramatic musical work embodied in a phonorecord."

Subsection (b)(1) limits the exclusive right to perform works "by means of a coin-operated phonorecord player" according to the provisions of paragraph (b)(2).

Subsection (b)(2) specifies that if the Copyright Royalty Tribunal "certifies by publication in the Federal Register" that the parties have not yet negotiated a voluntary license agreement "during the one year prior to the effective date of this Act," then the prior fixed rate of Section 116 shall remain in force. The compulsory license is available when the quantity of works available under voluntary licensing agreements is less that the quantity of the musical works performed in the year prior to the effective date of the Act. Under subsection (b)(2), the negotiations between the parties are to be completed within one year after the effective date of this bill to avoid reinstatement of Section 116 "as in effect on the day before the effective date of this Act." This will provide incentives to both parties to achieve a suitable voluntary licensing arrangement.

Under subsection (c)(1), owners of copyrights and operators of jukeboxes may negotiate licensing agreements "notwithstanding any provision of antitrust law." This exemption from antitrust review extends to the "terms and rate of royalty payments," "the proportionate division of fees," and the designation of agents to "negotiate, agree to, pay, or receive" payment of royalties. This exemption also applies to any arbitration processes. This exemption is patterned after those contained in existing copyright law (see, e.g., 17 U.S.C. 116 (b) (jukebox compulsory license) and 17 U.S.C. 118 (b) (non-commercial broadcasting)).

Subsection (c)(2) permits the copyright owners and jukebox operators "to determine the result of the negotiations by arbitration," if necessary. Any arbitration is to be governed by the provisions of Title 9, "to the extent such title is not inconsistent with this section." In the event of arbitration, the parties have the duty to report any determination reached by arbitration to the CRT. A determination by arbitration will bind the parties on the issues to which the determination relates.

Under subsection (d), negotiations that result in license agreements between one or more copyright owners and one or more jukebox operators, if conducted in accordance with this new section 116, shall be "in lieu of any otherwise applicable determination by the Tribunal."

Subsection (e) of revised 116 places an obligation on jukebox operators and copyright owners to notify the chairman of the Copyright Royalty Tribunal of meetings to commence negotiations. If notified within 60 days of the effective date of this Act, the chairman shall set a date and location for the first meeting between copyright owners and owners of coin-operated phonorecord players. In no event shall the first meeting be held "more than 90 days after the effective date of [this] Act."

Subsection (f) clarifies that the Copyright Royalty Tribunal no longer has any ratemaking authority with respect to copyright owners and jukebox operators unless the parties are unable to formulate a voluntary licensing agreement within one year of the effective date of this Act.

Subsection (g) states that the current compulsory license remains in effect until the parties have agreed on voluntary licensing arrangements in compliance with this Act. This will fill the gap between the effective date of this Act and the successful completion of negotiations. Further, if a negotiated license comes into effect but later lapses, expires or otherwise terminates, leaving no suitable licensing arrangement in place, then the current Section 116 returns to full force.

Finally, subsection (h) does not change any of the definitions listed in the original Section 116. However, this subsection does not include a definition of a "performing rights society" which was included in the original, since that term does not appear in section 116 as amended.

Section 5—Recordation

Section 205(d) of the Copyright Act makes recordation of a transfer of ownership of, or of exclusive rights in, a copyright a prerequisite to the initiation of an infringement action by a transferee. For the reasons discussed in part III of this report, the committee concludes that this provision creates a formality which is incompatible with the Berne Convention. Section 5 of the bill simply deletes this provision, leaving intact the other statutory incentives for recordation found in sections 205(c) (recordation of a transfer pertaining to a registered work provides constructive notice of the transfer) and 205(e), redesignated as 205(d), (recordation of transfer gives it priority over conflicting transfers under certain circumstances).

Section 6—Preemption

Section 6 of the bill amends section 301 of the Copyright Act, dealing with federal preemption, by creating a new section 301(e). This provision applies to the issue of preemption the general principles expressed in the declarations contained in section 2 of the Act, the rules of construction established by section 3 of the Act, and the amendment to 17 USC 104 made by section 4(3) of the Act. Questions of the existence or scope of federal preemption of state statutory and decisional law, like other questions of rights and interests in works subject to copyright, shall be resolved through the normal processes of statutory interpretation and analysis of precedent, rather than by reference to U.S. adherence to the Berne Convention or the satisfaction of U.S. obligations thereunder.

Section 7—Notice of Copyright

Section 7(a)—Visually Perceptible Copies

As discussed in Part III of this report, the requirement in current law of notice as a condition of copyright protection is inconsistent with the Berne prohibition on formalities. Section 7(a) of the bill eliminates the mandatory notice provisions of current law, while creating a limited incentive for notice which is compatible with Berne.

Section 7(a) amends 17 USC 401 to eliminate references to mandatory placement of notice on all publicly distributed copies of works. However, the committee recognizes the value of including notice of copyright on publicly distributed works. The placement of such notices on copies of works alerts users to the fact that copyright is claimed in the work in question, and may prevent many instances of unintentional infringement. Accordingly, section 7(a) also creates an additional incentive for notice by adding to 17 USC 401 a new subsection (d), which, in specified circumstances, will allow a copyright proprietor who places notice on copies of the work to prevent an attempt by an infringer to mitigate damages.

The second sentence of 17 USC 504(c)(2), the statutory damages provision of the Copyright Act, provides that "in a case where the infringer sustains the burden of proving, and the courts finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100." (This provision is not otherwise affected by S. 1301, except that section 10(b) of the bill doubles the $100 figure to $200, as part of the general doubling of statutory damages.) Obviously, in a case in which the copies of the work to which the defendant had access to not contain a notice of copyright, the defendant may be able to meet this burden, thereby invoking the discretion of the court to mitigate statutory damages.

New section 401(d) of the Copyright Act, as enacted by section 7(a)(4) of S. 1301, directs the court to give "no weight" to this defense in a case in which the copies to which the defendent had access included a notice of copyright in the form and position specified by the statute. In order to benefit from this provision, the copyright proprietor need not prove that notice was placed on *all* published copies of the work; but the proprietor must prove that the copies to which the defendant had access bore such notice. (Of course, proof that notice was placed on all published copies will satisfy this burden.)

While proof that notice appears on the copies to which the defendant had access prevents the defendant from prevailing in its plea for mitigation of damages, the absence of such notice from the copies in question does not guarantee the success of such a plea. The availability of the mitigation of danages provided for in section 504 (c)(2) remains a matter committed to the court's discretion in those cases to which new section 401(d) (or, in the case of phonorecords, new section 402(d)) does not apply.

Section 7(b)—Phonorecords of Sound Recordings

Current section 402 of the Copyright Act contains mandatory notice provisions for phonorecords of sound recordings. Section 7(b) of S. 1301 amends this section to eliminate these provisions, and to provide a statutory incentive for placing notice on phonorecords parallel to the provisions applicable to other works under section 401, as amended.

Section 7(c)—Publications Incorporating U.S. Government Works

Current section 403 of the Copyright Act requires that the mandadory notice on copies or phonorecords "consisting preponderantly of one or more works of the United States Government" include a statement identifying portions as to which copyright is claimed (since copyright is not available for U.S. government works). Section 7(c) of S. 1301 amends section 403 by eliminating the reference to mandatory notice, and by specifying that the notice which renders mitigation of damages unavailable under new section 401(d) or 402(d) must, in the case of works described in section 403, contain a statement identifying those portions as to which copyright is claimed.

Section 7(d)—Notice of Copyright; Contributions to Collective Work

Current section 404(a) of the Copyright Act provides for so-called "masthead notice," whereby a single notice applicable to a collective work serves as notice with respect to the separate contributions it contains (other than certain advertisments). Section 7(d)(1) of S. 1301 adapts this provision to the optional notice regime required in order to comply with Berne, and specifies that "masthead notice" is sufficient to invoke the provisions of sections 401(d) or 402(d) with respect to the separate contributions (other than certain advertisments) in a collective work.

Section 7(e) Omission of Notice

Section 7(f) Error in Name or Date

Sections 404(b), 405, and 406 of the current Copyright Act govern situations in which the mandatory notice requirement has not been fully complied with, because the notice has been improperly omitted or contains erroneous information. Since S. 1301 eliminates the mandatory notice requirement, sections 7(d)(2), 7(e), and 7(f) of the bill amend these sections to limit their applicability to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Implementation Act of 1988. To determine the applicability of these provisions, the operative date is the date of authorized public distribution, not the date of affixation or omission of the notice.

Section 8—Deposit of Copies or Phonorecords

Section 8 of S. 1301 amends the provisions of 17 USC 407(a) requiring deposit of copies or phonorecords with the Library of Congress by eliminating the phrase "with notice of copyright." Under the bill, deposit is required with respect to any copyrighted work published in the United States, regardless of whether it is published with notice of copyright. As noted above, the deposit requirement is not a prohibited formality under the Berne Convention since failure to comply has no consequences for the enjoyment and exercise of copyright. At the same time, the committee recognizes that the requirement of deposit of all published works advances the purposes of the Copyright Clause of the Constitution, Art. I, sec. 8, cl. 8, and that although deposit is not a condition of copyright protection, it is, in a sense, an element of the "quid pro quo" paid by authors and copyright owners for the benefits they enjoy as copyright proprietors. The expansion of the deposit requirement to include works published without notice further underscores the importance of the requirement, and should enhance the usefulness of this means of acquisition by the Library of Congress of works for its collections.

Section 9—Copyright Registration

Section 9(a) Registration in General

Under current law, the omission of mandatory copyright notice may be cured, and copyright protection thereby retained, under the conditions specified in 17 USC 405(a). One of these conditions is the timely registration of the work (17 USC 405(a)(2)). Registration of a work as a condition of the existence of copyright protection is indisputably inconsistent with Berne's prohibition of formalities. Section 9(a)(1) of the bill eliminates the reference in 17 USC 408(a) to section 405(a). (As noted above, after enactment of this legislation, section 405 will be of merely transitory significance in the case of pre-enactment public distributions of works.)

Section 9(a)(2) of the bill eliminates 17 USC 408(c)(2)(A) and makes conforming changes to the remaining provisions of section 408(c)(2). The deleted provision addresses the use of a copyright notice that may qualify a work for a group registration procedure.

In light of the elimination of mandatory notice, this provision is unnecessary and potentially confusing.

Section 9(b) Infringement Actions

Section 9(b) of the bill revises section 411 of the Copyright Act. This section contains the statutory prerequisite of registration as a condition to an infringement suit. As discussed above, the committee concludes that this requirement is incompatible with Berne standards, at least as applied to foreign works originating in Berne member States. The new section 411(a) simply states that "registration is not a prerequisite to the institution of a civil action for infringement of copyright." Under current law, registration is not a statutory precondition for criminal enforcement of copyright, and the bill makes no change in this area. Similarly, the bill retains the other statutory incentives for registration, such as the *prima facie* effect of registration certificate in infringement litigation (section 410(c)); the limitations on the availability of statutory damages and attorneys' fees to cases involving registered works (section 412); and the limitation on the availability of constructive notice and priority for recorded transfers to those involving registered works (section 205(c) and (e)). As discussed above, these valuable and powerful incentives for registration are fully consistent with Berne standards.

Section 411(b) of the current law imposes a registration requirement for infringement suits with respect to works such as live broadcasts that are first fixed simultaneously with transmission. In accordance with the committee's conclusion that registration as a condition of copyright enforcement is incompatible with Berne standards, the new section 411(b) omits this registration requirement, and substitutes for it requirement that the copyright owner declare to the potential infringer "an intention to secure copyright in the work."

Section 10—Copyright Infringement Remedies

Section 10(a) Infringement

17 USC 501(b) restates the rule of current law that registration, and, where applicable, recordation, are statutory prerequisites to the initiation of an infringement lawsuit. Section 10(a) of S. 1301 eliminates the references in section 501(b) to the other provisions of the Copyright Act (sections 205(d) and 411) that create this prerequisite, which the committee has concluded is incompatible with the Berne Convention. It substitutes a reference to the Berne-compatible requirements of section 411(b) in the case of live broadcasts.

Section 10(b) Damages and Profits

Section 10(b) of S. 1301 amends the statutory damages provisions of 17 USC 504 by doubling the statutory damage levels contained therein. As noted above, the committee is motivated by two factors in making these changes. First, the committee wishes to encourage registration of all copyrighted works, even though it has concluded that registration as a precondition to an infringement suit is not permitted by Berne Convention. Doubling the statutory damages, which, of course, remain available only with respect to registered works significantly enhances the incentives to registration (17 USC 412). Second, as the Copyright Office testified as long ago as 1986, the statutory damage levels enacted in 1976 have been eroded by inflation, and a doubling of these figures is necessary in order to retain the deterrent effect against potential infringers that Congress intended to create in the 1976 copyright revision.

Section 11—Copyright Royalty Tribunal

As noted above, S. 1301 replaces the existing statutory compulsory license for jukebox performance with provisions that authorize voluntary negotiations among copyright proprietors and jukebox operators. These provisions are intended to encourage the negotiation of comprehensive licensing agreements in this field. The rate-setting powers of the Copyright Royalty Tribunal (CRT) are retained simply as a back-up mechanism if these voluntary negotiations prove fruitless.

Section 11 of S. 1301 makes certain technical changes to chapter 8 of Title 17, United States Code, in order to accommodate this new method of licensing jukebox performances of musical works. Three principal technical changes are included.

First, section 11(1) of the bill amends 17 USC 801 with respect to the factors the CRT should consider in the event that a voluntary agreement among the parties is not reached, or lapses at some future time without a new agreement to replace it. Under these circumstances, in setting a royalty rate that, among other statutory factors, provides a fair return to copyright owners (17 USC 801(b)(1)(B)), the CRT should give "appropriate weight" to two types of pre-existing rates: the rates determined in the most recent CRT jukebox proceeding under old section 116 of the Act ("past CRT rates"), and the rates contained in any voluntary licensing agreement ("licensed rates").

The committee considered whether to direct the CRT to tie the royalty rate it orders more closely to past CRT rates and licensed rates. It concluded that the CRT should retain the flexibility to give these rates the weight it considers appropriate. In some factual situations, past CRT rates and/or licensed rates will, by themselves, provide an appropriate benchmark for new CRT determinations. In other factual situations, however, these rates will properly have less relevance to the CRT's new determination.

For example, if negotiations after enactment of S. 1301 lead quickly to a comprehensive voluntary licensing agreement, but some years later that agreement lapses and is not renewed, the CRT will once again be responsible for setting jukebox license rates. At that point, the most recent CRT rate, set years in the past, may have little if any relevance to the fairness of a rate to be set by the CRT under economic conditions wholly different from those prevailing at the time of the most recent CRT rate determination.

Similarly, licensed rates could include those found in a license covering a small, and relatively atypical, group of musical works, or a small and unrepresentative group of jukebox operators, and could, as well, result from negotiations occurring long before the CRT is once again called upon to set rates. Under these circumstances, it would be imprudent to bind the CRT to these licensed rates in making its new determination.

The committee recognizes that the flexibility that S. 1301 gives to the CRT in setting jukebox rates in the absence or upon the lapse of voluntary licensing agreements may increase the uncertainties attendant upon the back-up licensing procedures. In the committee's view, some degree of uncertainty is desirable. One of the best incentives to the parties to reach agreement on voluntary licensing arrangements is uncertainty about the rate the CRT would set if negotiations fail. At the same time, or course, the CRT retains the responsibility to set rates that are "calculated . . . to minimize and disruptive impact on the structure of the industries involved and on generally prevailing industry practices." 17 USC 801(b)(1)(D).

The second technical change made by section 11 of S. 1301 pertains to the timing of petitions to the CRT for adjustments in the jukebox royalty rate. Under current law, 17 USC 804(a)(2)(C), "such petitions may be filed in 1990 and in each subsequent tenth calendar year." In order to accommodate this provision to the situation in which the CRT's rate-setting authority will be invoked, if at all, only intermittently, upon the failure of private parties to reach or to renew voluntary licensing agreements, S. 1301 adds authority to petition at any time within one year after negotiated licenses terminate or expire without replacement.

Finally, section 11 adds a new provision (section 804(a)(3)), which also concerns the situation in which a rate-setting petition is filed upon the termination or expiration of a voluntary agreement. In such circumstances, the CRT is directed to establish promptly an interim royalty rate for jukebox performance of musical works, which will remain in effect until the conclusion of rate-setting proceedings under the petition (which under the old section 804(e) must take place within a year from initiation of the proceedings), or until a new voluntary license is negotiated, whichever comes first. This section also authorizes the CRT to apply retroactively the rate that it finally determines to be appropriate. These new provisions, along with those described in the preceding paragraph, should eliminate the possibility of a hiatus in licensing arrangements upon the lapse of a voluntary agreement, and prevent the creation of a situation in which the authority for jukebox performances of musical works, and the compensation to be paid for such performance if legally authorized, may be in doubt.

Section 12—Works in the Public Domain (Retroactivity)

Section 12 provides that no retroactive protection is provided for any work that is in the public domain in the United States. In effect, this means that if a work has enjoyed protection in the United States, either as an unpublished or as a published work, and has subsequently had its term of protection expire there is no obligation to renew protection in that work. The obligations of the United States under the Berne Convention therefore will apply only to works which are protected in the United States on the effective date of this Act or to works which subsequently become subject to such protection.

Section 13—Effective Date

Section 13(a)—Effective Date

Section 13 specifies that the Act and the amemdments to title 17, United States Code, made by the Act take effect on the same day on which the Berne Convention enters into force for the United States. The committee concludes that the Act and the amendments made by the Act should take effect on the same day the treaty enters into force for the United States based on recommendations from the State Department. (See April 7, 1988 letter from Betsy R. Warren, Acting Assistant Secretary for Legislative Affairs, U.S. Department of State, to Congressman Robert W. Kastenmeier, April 24, 1988 letter from J. Edward Fox, Assistant Secretary for Legislative Affairs, U.S. Department of State, to Senator Dennis DeConcini.)

Section 13(b)—Effect on Pending Case

In order to minimize any potential disruptive effect of this legislation on pending litigation, section 13(b) provides that the amendments made by this Act do not apply to causes of action arising before the effective date.

VII. AGENCY VIEWS

During the Patents, Copyrights and Trademarks Subcommittee's hearings on S. 1301 and S. 1971, the Department of State, the Department of Commerce and the U.S. Trade Representative expressed strong support for legislation that would amend Title 17 of the United States Code to being U.S. laws into compliance with the requirements of the Berne Convention. The Copyright Office also articulated its support for U.S. membership in the Berne Convention. These officials testified that adherence to Berne would foster U.S. participation in international trade and enhance protection of U.S. intellectual property. See testimony of Ambassador Clayton Yeutter, United States Trade Representative; Secretary C. William Verity, Department of Commerce; Allen Wallis, Under Secretary of Economic Affairs, Department of State; and Ralph Oman, Register of Copyrights.

VIII. COST ESTIMATE

On May 5, 1988, the committee received the following letter from the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 5, 1988.

Hon. Joseph R. Biden, Jr., *Chairman,*
Committee on the Judiciary, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1301, the Berne Convention Implementation Act of 1988, as ordered reported by the Senate Committee on the Judiciary, April 14, 1988. We expect that enactment of the bill would result in additional cost to the federal government of about $700,000 to $1 million in fiscal year 1989 and $450,000 to $750,000 each year thereafter.

The Berne Convention, which has been signed by 76 countries, sets minimum copyright standards aimed at giving copyrighted works international protection. S. 1301 would make certain changes to existing U.S. copyright law to conform to codes established under the convention. These changes would be required because several Berne provisions conflict with current U.S. copyright law. Specifically, the bill makes several changes that would (1) give guidance to the courts about how to construe U.S. adherence to the convention, (2) define the subject matter and scope of copyrights under Berne, and (3) define the type of notice, filing, or registration that is required for a work to be protected against unauthorized use.

The change in scope of U.S. copyright law would require an initiative on the part of the Copyright Office, a branch of the Library of Congress, to educate both present and potential copyright owners of the changes to existing law. The Copyright Office has indicated that in order to disseminate this new public information they would meet with affected parties, prepare (and subsequently mail) informational pamphlets, and hire several additional information officers. Based on information from the Copyright Office, CBO estimates that the cost of this public information initiative, along with some additional printing costs, would cost the federal government about $400,000 in fiscal year 1989, decreasing to about $150,000 each year thereafter.

The bill would relax a requirement that a copyrighted work must be registered with the Copyright Office before a civil action for infringement of the copyright can be instituted. Under current law, a fee is charged to each applicant seeking to register a work with the Copyright Office. These fees are used to offset administrative expenses. If the requirement is relaxed it is possible that fewer persons would perceive the need to register works with the Copyright Office, resulting in a reduction in the amount of fees collected. Based on information from the Copyright Office, we expect a 5 to 10 percent decrease in the number of works registered, resulting in a reduction in revenue of about $300,000 to $600,000 each year beginning in fiscal year 1989.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

James L. Blum,
Acting Director.

IX. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b), Rule XXVI, of the Standing Rules of the Senate, the committee concludes that enactment of S. 1301 would beneficially reduce regulatory burdens on copyright holders. Under S. 1301, copyright owners would no longer be required to register their work with the Copyright Office or mark their products as a prerequisite to enforcing their legal rights. However, substantial statutory incentives for registration and notice will probably lead most copyright proprietors to continue to undertake these activities. It is noteworthy that a different section of the bill will afford copyright owners and jukebox operators the opportunity to negotiate voluntary licensing agreements. Ratemaking by the Copyright Royalty Tribunal would only take place if negotiations fail. After due consideration, the committee concludes that enactment of S. 1301 will reduce paperwork burdens.

X. CHANGES IN EXISTING LAW

In compliance with paragraph (12) of rule XXVI of the Standing rules of the Senate, changes in existing law made by S. 1301 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

UNITED STATES CODE

* * * * * * *

TITLE 17—COPYRIGHTS

* * * * * * *

Chapter Sec.

1. Subject Matter and Scope of Copyright 101
2. Copyright Ownership and Transfer 201
3. Duration of Copyright 301
4. Copyright Notice, Deposit, and Registration 401
5. Copyright Infringement and Remedies 501
6. Manufacturing Requirement and Importation [1] 601
7. Copyright Office 701
8. Copyright Royalty Tribunal 801

[1] So in original. Does not conform to chapter hearing.

* * * * * * *

Chapter 1.—SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 101. Definitions

As used in this title, the following terms and their variant forms means the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

A work is a "Berne Convention work" if—

(1) in the case of an unpublished work, one or more of the authors is a national of a State adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a State adhering to the Berne Convention on the date of first publication;

(2) the work was first published in a State adhering to the Berne Convention, or was simultaneously published in a State adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention;

(3) in the case of an audiovisual work—

(A) if one or more of the authors is a legal entity, that author has its headquarters in a State adhering to the Berne Convention; or

(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a State adhering to the Berne Convention; or

(4) in the case of a pictorial, graphic, or sculptural work, such work is incorporated in a building or other structure located in a State adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a State adhering to the Berne Convention is considered to be a national of that State. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more nations if its dates of publication are within 30 days of one another.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

* * * * * * *

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, [technical drawings, diagrams, and models.], *diagrams, models, and technical drawings, including architectural plans.* Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

* * * * * * *

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a

national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party, or is a stateless person, wherever that person may be domiciled; or

* * * * * * *

(4) the work is a Berne Convention work; or

[(4)**]** *(5)* the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

(c) EFFECT OF BERNE CONVENTION.—No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the United States adherence thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon the provisions of the Berne Convention, or United States adherence thereto.

* * * * * * *

§ 108. Limitations on exclusive rights. Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; *and*

(2) the collection of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized **[**field; and**]** *field.*

[(3) the reproduction or distribution of the work includes a notice of copyright.**]**

* * * * * * *

[§ 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

[(a) LIMITATION ON EXCLUSIVE RIGHT.—In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

[(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless—

[(A) such proprietor is the operator of the phonorecord player; or

[(B) such proprietor refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate required by clause (1)(C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full discounts, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).

[(b) RECORDATION OF COIN-OPERATED PHONORECORD PLAYER, AFFIXATION OF CERTIFICATE, AND ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

[(1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phonorecord player shall fulfill the following requirements:

[(A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available on that particular phonorecord player, the operator shall file in the Copyright Office, in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation, an application containing the name and address of the operator of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player, and deposit with the Register of Copyrights a royalty fee for the current calendar year of $8 for that particular phonorecord player. If such performances are made available on a particular phonorecord player for the first time after July 1 of any year, the royalty fee to be deposited for the remainder of that year shall be $4.

[(B) Within twenty days of receipt of an application and a royalty fee pursuant to subclause (A), the Register of Copyrights shall issue to the applicant a certificate for the phonorecord player.

[(C) On or before March 1 of the year in which the certificate prescribed by subclause (B) of this clause is issued, or within ten days after the date of issue of the certificate, the operator shall affix to the particular phonorecord player, in a position where it can be readily examined by the public, the certificate, issued by the Register of Copyrights under subclause (B), of the latest application made by such operator under subclause (A) of this clause with respect to that phonorecord player.

[(2) Failure to file the application, to affix the certificate, or to pay the royalty required by clause (1) of this subsection renders the public performance actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

[(c) DISTRIBUTION OF ROYALTIES.—

[(1) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a detailed statement of account covering all fees received for the relevant period provided by subsection (b).

[(2) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

[(3) After the first day of October of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1). If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

[(4) The fees to be distributed shall be divided as follows:

[(A) to every copyright owner not affiliated with a performing rights society, the pro rate share of the fees to be distributed to which such copyring owner proves entitlement.

[(B) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

[(C) during the pendency of any proceeding under this section, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

[(5) The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the muisical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. Any person who alleges that he or she has been denied the access permitted under the regulations prescribed by the Copyright Royalty Tribunal may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

[(d) Criminal Penalities.—Any person who knowingly makes a false representation of a material fact in an application filed under clause (1)(A) of subsection (b), or who knowingly alters a certificate issued under clause (1)(B) of subsection (b) or knowingly affixes such certificate to a phonorecord player other then the one it covers, shall be fined not more than $2,500.

[(e) Definitions.—As used in this section, the following terms and their variant forms mean the following:

[(1) A "coin-operated phonorecord player" is a machine or device that—

[(A) is employed solely for the performance of non-dramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

[(B) is located in an establishment making no direct or indirect charge for admission;

[(C) is accommpanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

[(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

[(2) An "operator" is any person who, alone or jointly with others:

[(A) owns a coin-operated phonorecord player; or

[(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

[(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

[(3) A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.]

§ 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

(a) This section applies to any nondramatic musical work embodied in a phonorecord.

(b)(1) In the case of a work to which this section applies, the exclusive right under paragraph (4) of section 106 to perform the work publicly means of a coin-operated phonorecord player is limited to the extent that paragraph (2) applies.

(2) If, one year after the effective date of the Berne Convention Implementation Act of 1988, the Copyright Royalty Tribunal certifies by publication in the Federal Register that negotiated licenses authorized by subsection (c) have not come into effect so as to provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the one-year period ending on the effective date of such Act, then section 116 as in effect on the day before the effective date of such Act shall be effective with respect to musical works that are not the subject of such negotiated licenses.

(c)(1) Notwithstanding any provision of the antitrust laws, any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(2) Parties to such a negotiation, within such time as may be specified by the Copyright Royalty Tribunal by regulation, may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice to the Copyright Royalty Tribunal of any determination reached by arbitration and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.

(d) License agreements between one or more copyright owner and one or more operator of coin-operated phonorecord players, which are negotiated in accordance with subsection (c), shall be given effect in lieu of any otherwise applicable determination by the Copyright Royalty Tribunal.

(e) Not later than 60 days after the effective date of the Berne Convention Implementation Act of 1988, if the Chairman of the Copyright Royalty Tribunal has not received notice, from copyright owners and operators of coin-operated phonorecord players referred to in subsection (c)(1), of the date and location of the first meeting between such copyright owners and such operators to commence negotiations authorized by subsection (c), the Chairman shall announce the date and location of such meeting. Such meeting may not be held more than 90 days after the effective date of such Act.

(f) The Copyright Royalty Tribunal shall not conduct any ratemaking activity with respect to coin-operated phonorecord players unless, at any time more than one year after the effective date of the Berne Convention Implementation Act of 1988, the negotiated licenses adopted by the parties under this section do not provide permission to use a quantity of muscial works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the one-year period ending on the effective date of such Act.

(g) Until such time as licensing provisions are determined by the parties under this section, the terms of the compulsory license, with respect to the public performance of nondramatic musical works by means of coin-operated phonorecord players, which is in effect on the day before the effective date of the Berne Convention Implementation Act of 1988, shall remain in force. If the negotiated licenses authorized by this section come into force so as to supersede previous determinations of the Copyright Royalty Tribunal, as provided in subsection (d), but thereafter are terminated or expire without replacement by subsequent agreements, then section 116 as in effect on the day before the effective date of such Act shall be effective with respect to musical works that are not subject of such negotiated licenses.

(h) As used in this section, the following terms and their variant forms mean the following:

(1) A "coin-operated phonorecord players" is a machine or device that—

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An "operator" is any person who, alone or jointly with other—

(A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to excercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

* * * * * * *

Chapter 2.—COPYRIGHT OWNERSHIP AND TRANSFER

* * * * * * *

§ 205. Recordation of transfers and other documents

(a) CONDITIONS FOR RECORDATION.—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document.

* * * * * * *

[(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that it arose before recordation.]

[(e)] *(d)* PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

[(f)] *(e)* PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NONEXCLUSIVE LICENSE.—A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if—

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

* * * * * * *

Chapter 3.—DURATION OF COPYRIGHT

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

* * * * * * *

(e) The scope of preemption under this section shall be neither expanded nor reduced by virtue of, or in reliance upon, the adherence of the United States to the Berne Convention, or the satisfaction of United States obligations thereunder.

* * * * * * *

Chapter 4.—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

Sec.

401. Notice of copyright: Visually perceptible copies.
402. Notice of copyright: Phonorecords of sound recordings.
403. Notice of copyright: Publications incorporating United States Government works.
404. Notice of copyright: Contributions to collective works.
[405. Notice of copyright: Omission of notice.]
405. Notice of copyright: Omission of notice on certain copies and phonorecords.
[406. Notice of copyright: Error in name or date.]
406. Notice of copyright: Error in name or date on certain copies and phonorecords.
407. Deposit of copies or phonorecords for Library of Congress.
408. Copyright registration in general.
409. Application for copyright registration.
410. Registration of claim and issurance of certificate.
[411. Registration as prerequisite to infringement suit.]
411. Registration and infringement actions.
412. Registration as prerequisite to certain remedies for infringement.

Chapter 4.—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

§ 401. Notice of copyright: Visually perceptible copies

(a) GENERAL REQUIREMENT.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section [shall be placed on all] *may be placed on* publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) FORM OF NOTICE.—[The notice appearing on the copies] *If a notice appears on the copies, it* shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationary, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

(c) Position of Notice.—[The notice] *Any notice referred to in subsection (a)* shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

(d) Evidentiary Weight of Notice.—If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on "innocent infringement" in mitigation of actual or statutory damages.

§402. Notice of copyright: Phonorecords of sound recordings

(a) General Requirement.—Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section [shall be placed on] *may be placed on* all publicly distributed phonorecords of the sound recording.

(b) Form of Notice.—[The notice appearing on the phonorecords] *If a notice appears on the phonorecords, it* shall consist of the following three elements:

(1) the symbol # (the letter P in a circle); and

(2) the year of first publication of the sound recording; and

(3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

(c) Position of Notice.—[The notice] *Any notice referred to in subsection (a)* shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.

(d) Evidentiary Weight of Notice.—If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on "innocent infringement" in mitigation of actual or statutory damages.

§ 403. Notice of copyright: Publications incorporating United States Government works

[Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by sections 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.]

Sections 401(d) and 402(d) shall not apply to a work published in copies or phonorecords consisting preponderantly of one or more works of the United States Government unless the notice of copyright appearing on the published copies or phonorecords to which a defendant in the copyright infringement suit had access includes a statement identifying, either affirmatively or negatively, those portions or the copies or phonorecords embodying any work or works protected under this title.

§ 404. Notice of copyright: Contributions to collective works

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 through 403. However, a single notice applicable to the collective work as a whole is sufficient [to satisfy the requirements of sections 401 through 403] *to invoke the provisions of section 401(d) or 402(d), as applicable* with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) [Where] *With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where* the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 406(a).

[§ 405. Notice of copyright: Omission of notice.] *§ 405. Notice of Copyright: Omission of Notice on Certain Copies and Phonorecords*

(a) EFFECT OF OMISSION ON COPYRIGHT.—[The omission of the copyright notice prescribed by] *With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, the omission of the copyright notice described in* sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

* * * * * * *

(b) EFFECT OF OMISSION ON INNOCENT INFRINGERS.—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, [*omitted and which was publicly distributed by authority of the copyright owner before the effective date of the Berne Conven-*

tion Implementation Act of 1988,] incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition or permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

* * * * * * *

§ 406. Notice of copyright: Error in name or date *on certain copies and phonorecords*

(a) ERROR IN NAME.—[Where] *With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988,* where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if such person proves that he or she was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun—

* * * * * * *

(b) ERROR IN DATE.—When the year date in the notice on copies or phonorecords distributed *before the effective date of the Berne Convention Implementation Act of 1988* by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.

(c) OMISSION OF NAME OR DATE.—Where copies or phonorecords publicly distributed, *before the effective date of the Berne Convention Implementation Act of 1988* by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405 *as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988.*

§ 407. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), and subject to the provisions of subsection (e), the owner of copyright or of the exclusive right of publication in a work published [with notice of copyright] in the United States shall deposit, within three months after the date of such publication—

* * * * * * *

§ 408. Copyright registration in general

(a) REGISTRATION PERMISSIVE.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. [Subject to the provisions of section 405(a), such] *Such* registration is not a condition of copyright protection.

* * * * * * *

(c) ADMINISTRATIVE CLASSIFICATION AND OPTIONAL DEPOSIT.—

(1) * * *

(2) Without prejudice to the general authority provided under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, under [all of] the following conditions—

[(A) if each of the works as first published bore a separate copyright notice, and the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner was the same in each notice; and]

[(B)] *(A)* if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

[(C)] *(B)* if the application identifies each work separately, including the periodical containing it and its date of first publication.

* * * * * * *

[§ 411. Registration as prerequisite to infringement suit

[(a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to beome a party shall not deprive the court of jurisdiction to determine that issue.

[(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

[(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

[(2) makes registration for the work within three months after its first transmission.]

§ 411. Registration and infringement actions

(a) Registration is not a prerequisite to the institution of a civil action for infringement of copyright.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner serves notice upon the infringer, not less than 10 or more than 30 days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work.

* * * * * * *

Chapter 5.—COPYRIGHT INFRINGEMENT AND REMEDIES

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of [sections 205(d) and 411,] *section 411(b),* to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

* * * * * * *

§ 504. Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

* * * * * * *

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than **[**$250**]** *$500* or more than **[**$10,000**]** *$20,000* as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than **[**$50,000.**]** *$100,000.* In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in[1] its discretion may reduce the award of statutory damages to a sum of not less than **[**$100.**]** *$200.* The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

* * * * * * *

Chapter 8.—COPYRIGHT ROYALTY TRIBUNAL

§ 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created an independent Copyright Royalty Tribunal in the legislative branch.

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be—

(1) * * *

* * * * * * *

(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116, and to determine, in cases where controversy exists, the distribution of such fees. *In*

determining whether a return to a copyright owner under section 116 is fair, appropriate weight shall be given to—

(i) the rates most recently determined by the Tribunal to provide a fair return to the copyright owner, and

(ii) the rates contained in any license negotiated under the authorization of section 116 of this title.

* * * * * * *

§ 804. Institution and conclusion of proceedings

(a) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 115 and 116, and with respect to proceedings under section 801(b)(2) (A) and (D)—

(1) on January 1, 1980, the Chairman of the Tribunal shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter; and

(2) * * *

(A) In proceedings under section 801(b)(2) (A) and (D), such petition may be filed during 1985 and in each subsequent fifth calendar year.

* * * * * * *

(C) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 116, such petition may be filed in 1990 and in each subsequent tenth calendar **[**year**]** *year, and at any time within 1 year after negotiated licenses authorized by section 116 are terminated or expire without replacement by subsequent agreements; and*

(3) if negotiated licenses authorized by section 116 come into force so as to supersede previous determinations of the Tribunal, as provided in section 116(d), but thereafter are terminated or expire without replacement by subsequent agreements, the Tribunal shall, upon petition of any party to such terminated or expired negotiated license agreement, promp[illegible] *establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such interim royalty rate or rates shall remain in force until the conclusion of proceedings to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116(d). The Tribunal may order that the royalty rates finally determined by the Tribunal to be reasonable shall be retroactive to the date such previously negotiated license agreements were terminated or expired.*

* * * * * * *

O